(1)

95-959

No.

Supreme Court, U.S.
FILED
DEC 6 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

640 BROADWAY RENAISSANCE CO.,

Petitioner,

vs.

JOHN EISNER, *et al.* and 15 Other Cases Consolidated for Purposes of a Joint Appeal,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department

PETITION FOR WRIT OF CERTIORARI

MARTIN R. FINE
Counsel of Record
Attorney for Petitioner
644 Broadway
New York, New York 10012
(212) 477-1155

7922
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

149P

QUESTIONS PRESENTED

1. Did the retroactive and involuntary application of the "Loft Laws" to building owner, result in an unconstitutional confiscation or taking, denial of due process, impairment of contracts, or unconstitutional bill of attainder or *ex post facto* law, or deny equal protection to building owner, where the statutory scheme retroactively forfeited and seized Plaintiff's rent collections for more than four years?

2. Does the legislature have constitutional power to totally destroy the bargained-for lease rights of the building owner and impose, retroactively, upon a specific group of pre-selected persons, vastly greater rights and economic powers than were in the bargained-for, freely-entered into leaseholds, and to convert short-term leaseholds into essentially lifetime tenancies - after legislatively forfeiting many years of rent collection and transferring such monies - retroactively - to former tenants and/or to unauthorized successors and assigns?

3. Is there any constitutional justification for a punitive seizure of the use and occupancy and long-term control of Owner's real estate, and the forfeiture of more than four years rent, where the pre-enactment penalty for such violation of the zoning laws, was fines of $500-$1,000 under §304 of the M.D.L.?

4. Where the solely retroactive legislation, impossible to avoid after "designation", has the direct, proximate and actual effect of bankrupting Owner, retroactively seizing its property rights to collect rent (thus making it impossible to comply with the legislative mandates) and subjects Owner to continuing civil and criminal penalties, and grants long-term leaseholds in Owner's property, is there no protection under the Constitution from such retroactive and arbitrary legislative abuse?

5. Does the state legislature have the constitutional power to delegate legislative authority to the Mayor of the City of New York, over every aspect of ownership of real estate - all retroactively imposed, where the Mayor is granted the authority to delegate such "legislative authority" to a purported administrative body, consisting of nine members, with no statutorily defined qualifications, and where eight of the nine members of this so-called "Loft Board" have financial and legal status directly adverse to the interests of the actual building owner?

6. If the Loft Laws were a legitimate exercise of "police power", why didn't the legislature require removal of persons from buildings that were allegedly unsafe for residential use, instead of seizing control of the building and turning it over, gratuitously, to former tenants to occupy (with many years of no rent at all), according to their sole option?

7. What is the constitutional justification for the retroactive imposition of long-term, legislative forfeitures of Owner's rent collections under §§301-2 of the M.D.L., based upon the tenants' illegal and unlawful acts?

8. Under the Constitution, does a state/city statutory scheme have the power to retroactively require (under threat of criminal and civil penalties): (a) an existing office/loft building owner to apply for a discretionary "special permit" and zoning change, altered building application, and new residential certificate of occupancy; and (b) then totally reconstruct its building (with state-licensed former tenants holding over - still in occupancy, but paying no rent), and to permanently convert it into a multiple dwelling; and then, after years of approvals, applications and construction time (with unpaid use and occupancy for many years during the forced reconstruction process), require gratuitous grants to such former tenants (or strangers) of essentially permanent residential leaseholds, vastly more onerous than the leases that Owner signed?

LIST OF PARTIES

The Plaintiff is a privately held New York partnership, with no publicly owned interests.

All the names of the Defendants-Respondents in the sixteen consolidated cases are as follows: John Eisner, Maureen Eisner, "John" or "Jane" Tringale; Carlos Sosa; Joel Hinman, Philip Murphy, Scorched Earth Productions; Bob Rossiter, Loren Callaway, Leslie Holtan, Bobob Construction; Richard Yoder, Rosemary Yoder, "John" or "Jane" Menchin, "John" or "Jane" Erickson, "John" or "Jane" Zoar; Charles Searles, Kathleen Spicer; Donna Goodman, Donna Goodman d/b/a Broadway Design Studios, Inc.; Peter Clinton Neptune, "John" or "Jane" Garvin; Rina Peleg, Avri Ohana; Temple Smith, Phoebe Rentschler, "John" or "Jane" Richardson, "John" or "Jane" Wilson, "John" or "Jane" Bourne; Marie Paul Faque, Maripolitan Popular Objects Ltd., "John" Bertoglio; Nancy Hoffman, a/k/a/ Nancy Geisman, a/k/a Nancy Hoffman Geisman, Marcia Dalby and Linda Henneman; Andrea Vignoli, L. Berry, R. Berry; Juliet Holland, Liv Clausen, "John" or "Jane" Mesnick; Hannah Eshel, "John" or "Jane" Markee; Ruth Hollomon.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	13
I - THE LOFT LAWS AS APPLIED HERE CONSTITUTE AN UNCONSTITUIONAL IMPAIRMENT OF PRIVATE CONTRACTS UNDER ART. I, §10	12
II - MULTIPLE DWELLING LAW, SEC. 301 AND 302, WHICH RETROACTIVELY FORFEITED OWNER'S RENTS FOR MORE THAN FOUR YEARS, IS UNCONSTITUTIONAL AS APPLIED HERE	17
III - THE LOFT LAWS AS HERE APPLIED, VIOLATE THE SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS OF OWNER	18

IV - AS APPLIED HERE, THE LOFT LAW IMPOSES A PUNITIVE RETROACTIVE CONFISCATION OF PROPERTY, THEREFORE IT CONSTITUTES AN UNCONSTITUTIONAL BILL OF ATTAINDOR OR *EX POST FACTO* LAW 22

V - AS APPLIED HERE, THE LOFT LAWS DEPRIVED OWNER OF EQUAL PROTECTION OF THE LAW 24

VI - AS APPLIED HERE, DESIGNATION UNDER THE LOFT LAWS, AUTHORIZED A PERMANEND PHYSICAL INVASION OF OWNER'S AND CONSTITUTED A TAKING WITHOUT JUST COMPENSATION 25

VII - THERE WERE NUMEROUS ISSUES OF FACT PRECLUDING SUMMARY JUDGMENT..... 29

CONCLUSION 30

TABLE OF AUTHORITIES

	Page
Allied Structural Steel Co. v. Spannaus, 438 US 234 (1978)	*12, passim*
Barbian v. Panagis, 694 F.2d 476 at 476 (7th Cir. 1982)	21
Board of Estimate of City of New York v. Morris, 109 S.Ct 1433 (1989)	3
Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1980)	30
City of Cleburn v. Cleburn Living Center, 473 U.S. 432 (1985)	25
County Dollar Corp. v. Douglas 556 NYS2d 533 (1st Dept. 1990)	9
Cummings v. Missouri, 71 U.S. [4Wall] 277, 18 L.Ed. 356 (1867)	22, *passim*
Deveau v. Braisted, 363 U.S. 144 (1960)	23
English v. Town of Huntington, 448 F.2d 319 (2d Cir 1971)	25
Eubank v. Richmond, 226 U.s.137 (1912)	20
First English Evan.Luth. Ch. v. Los Angeles Cty, 482 U.S. 314 (1987)	18, 29
Fletcher v. Peck, 10 U.S. (6 Cranch) 128 (1810)	23, *passim*
Flushing National Bank v. Municipal Assist. Corp., 40 NY2d 731, 390 NYS2d 22 (1976)	18, 19

Fred French Investment OD v. City of New York 39 NY2d 587, 385 NYS2d 5, cert.den 429 US 990 — 20

Gibson v. Berryhill, 411 U.S. 64 (1973) — 20

Glenel Realty Corp. v. Worthington, *164 NYS2d 625, 638 (2d Dept. 1957)* — 21

Hardin v. Pitney-Bowes, Inc., 451 451 U.S. 1008 (1981) — 30

Harisades v. Shaughnessy, 342 U.S. 580 (1952) — 23

Herrington v. Sonoma County, 834 F.2d 1488 (9th Cir. 1987) — 28

Hodel v. Irving, 481 U.S. 704 (1987) — 25

Home Bldg. & Loan Assoc. v. Blaisdell 290 US 398 (1934) — 14, *passim*

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) — 24

Hughes v. Washington, 389 U.S. 290 at 298 (1067) Sep. Opinion, Mr. Justice Stewart conc. — 18

Kaiser Aetna v. U.S., 444 U.S.164 (1979) — 28

Keystone Associates v. Moerdler, 19 NY2d 78 (Ct. Appeals 1966) — 20

Lefrak Forest Hills Corp. v. Galvin, 338 NYS2d 932 *aff'd* 32 NY2d 796 (1953) — 21, 22

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 419 (1982) — 25, *passim*

Louis Vuitton, S.A. v. Spencer Handbags, 765 F.2d 966 (2d Cir. 1985) 23

Matter of Temkin v. Karaghezoff, 34 NY2d 324 (1974) 21

Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) 25

Nieves v. Hess Oil Virgin Islands Corp., 819 F.2d 1237 (3rd Cir. 1987) 16

902 Associates, Ltd. v. Total Creative Services, 547 NYS 987 (App.Term 1989) 9

Nollan v. Calif. Coastal Commission, 483 U.S. 825 (1987) 25

People v. Sheridan Arms, 90 NYS2d 445 (1st Dept. 1949) *aff'd* 300 NYS 59 (1949) 23

Plyer v. Doe, 457 U.S. 202 (1982) 25

Sawyer v. U. S. Steel, et al, 197 F.2d 582, *aff'd* 343 U.S. 579 (1952 29

Seattle Trust Co. v. Rogerge, 278 US at 122 20

Seawall Associates, Ltd. v. City of New York 74 NY2d 92 (Ct. of Appeals 1989) 20, 26

Sederquist v. City of Tiburon, 265 F.2d 756 (9th Cir. 1984) 27

Silverman v. Barry, 727 F.2d 1121 (D.C.Cir. 1984) 27

640 Broadway Renaissance Co. v. Cuomo, 740 F.Sup.1023, *aff'd* 927 F.2d 593; *cert.den'd.* 111 S.Ct.2054, 114 L.E.2d 459 (1991) 11

Spring Realty v. New York City Loft Board, 47 NYs2D 973 (Sup.Ct. NY Co. 1985) *aff'd* 498 NYS2d 241 (1st Dept. 1986) modf'd on other grounds 69 NY2d 69 NY2d 657, 511 NYS2d 830 (1986), *app. dism'd*, 482 U.S.911 (1987) 12

South Terminal Corp. v. E.P.A., 504 F.2d 646, 680 (1st Cir. 1974) 14

U. S. v. Brown, 28 U.S. 437 (1965) 23, 24

United States v. General Motors Corp., 323 U.S. 373, 378 (1945) 18, 29

United States v. Lovett, 328 U.S. 303 (1946) 23

United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) 25

United States Trust Co. v. New Jersey, 431 U.S. at 22 (1977) 15, 16

Urbanizadora Versailles, Inc. v. Rios, 701 F.2d 993 (1st Cir. 1983) 21

Weaver v. Graham, 450 U.S. 24 (1981) 23

West Indian Trading Co., Ltd. v. Gov't of Virgin Islands, 844 F.2d 1007 (3rd Cit. 1988) 14

Zobel v. Williams, 457 U.S. 55 (1982) 25

Spring Realty v. New York City Loft Board, 47 NYs2D 973 (Sup.Ct. NY Co. 1985) *aff'd* 498 NYS2d 241 (1st Dept. 1986) modf'd on other grounds 69 NY2d 69 NY2d 657, 511 NYS2d 830 (1986), *app. dism'd*, 482 U.S.911 (1987) 12

South Terminal Corp. v. E.P.A., 504 F.2d 646, 680 (1st Cir. 1974) 14

U. S. v. Brown, 28 U.S. 437 (1965) 23, 24

United States v. General Motors Corp., 323 U.S. 373, 378 (1945) 18, 29

United States v. Lovett, 328 U.S. 303 (1946) 23

United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) 25

United States Trust Co. v. New Jersey, 431 U.S. at 22 (1977) 15, 16

Urbanizadora Versailles, Inc. v. Rios, 701 F.2d 993 (1st Cir. 1983) 21

Weaver v. Graham, 450 U.S. 24 (1981) 23

West Indian Trading Co., Ltd. v. Gov't of Virgin Islands, 844 F.2d 1007 (3rd Cit. 1988) 14

Zobel v. Williams, 457 U.S. 55 (1982) 25

TABLE OF CONTENTS - APPENDIX

	Page
APPENDIX A - Order of NY Court of Appeals dated September 7, 1995	1a
APPENDIX B - Decision and Order of Supreme Court Appellate Division First Dept. entered Feb. 7, 1995	3a
APPENDIX C - Decision of Supreme Ct. New York County dated July 12, 1993	5a
APPENDIX D - Order of NY State Supreme Court, NY County dated Nov. 10, 1993	12a
APPENDIX E - Order of NY State Supreme Court, NY County dated Nov. 10, 1993	15a
APPENDIX F - Complaint in NY State Supreme Ct, NY County dated Oct.9,1992	16a
APPENDIX G - Multiple Dwelling Laws	21a
APPENDIX H - Loft Board Regulations 8/26/83	40a
APPENDIX I - Excerpts - United States Constitution	50a
APPENDIX J - Opinion in *902 Assoc. Ltd. v. Total Picture Creative Services, Inc. and Peter Schneider*	52a

	Page
APPENDIX K - Opinion in *County Dollar Corp. v. Elise Douglas, et al*	60a
APPENDIX L - *New York Times* article dated May 25, 1986	63a
APPENDIX M - Excerpts from Tenants' Leases	67a
APPENDIX N - Certification of Clerk of United States Bankruptcy Court	78a
APPENDIX O - Certificate of Occupancy	80a
APPENDIX P - Loft Board Order dated April 28, 1988	83a

OPINIONS BELOW

This is a petition for a writ of certiorari to the Appellate Division, Supreme Court, First Department, which affirmed an order of the Supreme Court, New York County dated November 15, 1993 (Lobis, J.) granting Defendants' motions for summary judgments and dismissed the complaint herein, and denying Plaintiff's cross motions to amend the complaint and for other relief. This is a consolidation of sixteen cases brought against the occupants of sixteen loft units located at the premises owned by Plaintiff for non- payment of rent or use and occupancy for more than a four year period ending in August 1992.

The First Department, Appellate Division, New York State Supreme Court affirmed this order on February 7, 1995. A motion for reargument was denied on April 27, 1995. The Plaintiff moved for an order granting leave to appeal to the New York Court of Appeals, which motion was denied by an order dated September 7, 1995. This petition for writ of certiorari is filed within ninety days of that date.

JURISDICTION OF THIS COURT

The order of the New York State of Appeals denying Plaintiff's motion for leave to appeal was entered on September 7, 1995.

This Petition was timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text of the following provisions are set forth in the Appendix:
United States Constitution: Art. I, Sec. 10, cl.1
Fifth Amendment - Due Process Clause

- Takings Clause

Art. III, §§1 and 2;
Fourteenth Amendment

N.Y. Multiple Dwelling Law; Art.7-C,
§280-286; §§301-306; as amended

STATEMENT OF THE CASE

Plaintiff is the fee owner of a loft/office building in lower Manhattan, which brought these actions to collect rent or use and occupancy from sixteen occupants of its building, for more than a four year period. However, the New York Courts have held that the application of Art. 7C of the New York Multiple Dwelling Law (MDL) and related statutes ("Loft Laws", MDL §§280-287; §§301-6) (A-F); which retroactively and involuntarily designated its building as an "interim multiple dwelling", in April 1988, forfeited owner's fundamental property rights to collect rent, or use and occupancy, for its property, and Plaintiff could not collect any rent for this period of more than four years. The Loft Law "designation" turned a valuable real estate investment into property of nominal or negative value, forced the Plaintiff into Chapter 11 bankruptcy.

The Loft Laws "designation", stripped of verbiage, was solely dependent upon the willful illegal "residential" occupancy by tenants prior to the statute's passage.

In 1978, Owner bought a virtually vacant office/loft building located at 640 Broadway; constructed in 1895, it consists of nine stories. Owner substantially renovated and rented it to tenants under business "loft" leases. On June 21, 1982 (enactment date of "Loft Laws") 640 Broadway was a financially stable, fully rented building; and was in compliance with all substantial provisions of the building code, its existing certificate of occupancy for office/manufacturing use and the zoning regulations; however there were willful use violations solely by these

tenants - consisting of "residential" occupation (sleeping in building). Residential occupancy has always been illegal in this building because: (1) the certificate of occupancy mandates an office/manufacturing building; its permitted use is stores on the ground floor, and offices/manufacturing on the remaining 8 floors; (2) the building is located in an MI-5B Zone, which is a light manufacturing district under the Zoning Resolution ("ZR"), which expressly prohibited residential use. It constituted a misdemeanor for anyone to so occupy it (M.D.L. §304-1). Although "Joint living-work quarters for artists" are permitted in an MI5B Zone, such "artist" quarters were prohibited in 640 Broadway - unless and until an owner first obtained a special type of discretionary zoning variance known as a "special permit" (ZR 42-14(D)(1)(b)) and an approved alteration application (§284(1) (i) MDL) and a new residential certificate of occupancy. Obtaining these required permits and variances, retroactively imposed, and a new certificate of occupancy are lengthy and cumbersome processes which required the discretionary approval of several independent N.Y. City agencies, including City Planning Commission, Office of Economic Development, Department of Buildings, and the Board of Estimate[1] and major reconstruction of the building to meet "residential" requirements.

Although Owner did not want or need any:

(1) a discretionary "special permit" or
(2) an altered building application or
(3) a new certificate of occupancy,

Owner was forced under pain of criminal and civil penalties by the retroactive 1988 Loft Laws "designation" to hire architects and lawyers for this mandated "zoning variance" approval process, to rebuild the building to comply with, and to permanently convert from its existing

[1] Later abolished because it was held to be unconstitutional. *See Board of Estimate of City of New York v. Morris*, 109 S.Ct 1433 (1989)

office/ manufacturing use, to a currently illegal residential use. (M.D.L. §284).

It was uncontroverted that (a) 640 Broadway is not structurally suited to serve as a residential "multiple dwelling", and major structural changes would be required, including the installation of structural walls, hallways and doors, stairwells, staircases and exterior fire escapes, and installation of substantially new plumbing, heating, and electrical systems, and myriad other "residential" requirements[2]; and (b) up to Two Million Dollars ($2,000,000) would have to be expended to reconstruct this building to convert it into a multiple dwelling; compared to an arms-length purchase price in 1978, of Five Hundred Twenty-five Thousand Dollars ($525,000). Under existing city procedures, this would take years to do; the Loft Laws contemplate that this would take 3-5 years (See, §284(I)(D) M.D.L.) after (and if) this discretionary "special permit" variance was granted.

Although this retroactive statutory scheme is expressly dependent upon deliberate criminal violations by respondent tenants (during the retroactively specified period of April 1980-December 1981), of the certificate of occupancy, building codes and zoning laws prior to enactment, these former tenants and squatters are legislatively given rights under the "Loft Laws" to reside at the premises (at their option), virtually in perpetuity (after four or more years of paying no rent or use and occupancy at all), and convert short term leases - all expired more than ten years ago, into virtual lifetime tenancies (or longer). Not only must Owner gratuitously issue to a non-paying holdover tenant (or a stranger or transferee) a residential lease in accordance with the so-called "Emergency Tenant Protection Act of 1974" (governing modern apartment houses) which prescribed "residential" lease requires vastly increased owner

---

[2] Also, Owner would have to forever comply with myriad city/state laws and regulations, which only apply to residential buildings, but not to office/manufacturing buildings.

obligations and services to be rendered, but in total contradiction of the lease with tenants (freely entered into when the building was vacant in 1979-80), Owner's rent is forfeited for more than four years, and the tenants live rent free; although the former tenants signed what was clearly a business lease which expressly prohibited residential use, which was in effect when the Loft Laws were passed in June, 1982, and which were for a definite term of no more than four or five years. By these laws, the Plaintiffs short term leases were retroactively converted to lifetime leaseholds, at tenants' sole option.

The retroactive Loft Laws also apply whether or not the Owner had any knowledge, actual or constructive, of the illegal residential use by tenants.

Each lease expressly represented and covenanted that the premises were to be used for specified office or manufacturing purposes, and not as residences were products of arms-length transactions, with well-educated, sophisticated adults, represented by attorneys; the proposed tenant then had a residence elsewhere, and tenants further represented that they would comply with all laws relating to the use of the premises[3]. The leases, dated 1979-80, all prior to Loft Law's enactment, stated that: "Tenant acknowledges that the Certificate of Occupancy, if any, for the building does not Permit residential Occupancy of the Premises."

Furthermore, tenants agreed in the leases to pay yearly rent increases based on Consumer Price Index adjustments; retroactively - the Loft Laws also destroyed this most important right of the owner to cost of living adjustments.

Furthermore, the tenants expressly agreed to accept the demised premises "as is" and covenanted that:

"Landlord will not be obligated to do any

[3] Other provisions, typical of non-residential leases, included the obligation of the tenants to pay for all interior repairs and all non-structural repairs; to replace all broken glass; and to pay for all utilities, and painting, decorating, and rubbish removal.

work or make any repairs, alterations, or improvements in or to the demised premises, except as specifically set forth in this lease" ¶56.

The Loft Laws also retroactively destroyed this most important contract right of Plaintiff.

These business leases provided for a short term; most of these leases expired in 1983 or 1984, and all expired before the Loft Board decision in 1988. The former tenants (or successors) forcibly held over beyond the expiration of the lease (claiming State-granted rights and immunities to reside on the premises indefinitely under the protection of the Loft Laws); the tenants violated the leases in virtually every way -including the failure to pay rent, rent escalations, or use and occupancy - with state-granted immunity. Since immediately after "designation" by the "Loft Board" in April 1988, none paid any rent or use and occupancy for more than four years while owner was required to provide all "residential" services to the tenants, while being legally precluded from collecting any rent. Owner was owed a minimum of $1,000,000. in rent and use and occupancy - calculated at the rates set forth in the expired leases; this is only part of the losses owner has suffered solely by reason of the retroactive Loft Board designation and the forced occupation of its building by state-mandated squatters (many of whom were never "tenants" of Owner. Defendants can not deny that as a direct and proximate result of "Loft Law" designation, plaintiff was forced to file a Chapter 11 petition on February 22, 1990 (S.D.N.Y. #90 B 1057 (TLB)) when the Loft Laws designation made it impossible for owner to collect any rent, and therefore impossible to pay its ordinary operating expenses, taxes and mortgage.

Because tenants slept in the building in 1980-81, (in deliberate violation of explicit lease representations and state/city laws) the state/city has now legislatively rewarded this retroactively selected group, by granting estates in Owner's premises, and granting lifetime lease-

holds. Even though the tenants deliberate residential occupancy was a misdemeanor (M.D.L.§304); these admitted misdemeanors by the tenants were the *sine qua non* of the retroactive "designation" of Owners building (§281-1 (iii) M.D.L.).

According to lengthy and contradictory "legislative findings" (MDL §280). the Loft Laws were enacted supposedly because of a "serious public emergency"; but in fact, were special interest legislation, retroactively enacted to appease a small but vocal group of politically active "artists", who were already illegally residing in the targeted buildings.

It was not denied that this group constituted certain specific tenants organizations, including Lower Manhattan Loft Tenants Association (LMLTA)[4] - and the Loft Laws were retroactively tailored to transfer to specific or identifiable persons, long-term control of these buildings, were solely retroactive in coverage, and do not apply to any buildings converted <u>after</u> the statutory enactment; the targeted buildings were retroactively labeled "interim multiple dwellings": defined as buildings in certain zoning districts which, at any time, had been used for manufacturing or commercial purposes,, and were residentially occupied by three or more, during the arbitrarily selected and retroactive period, April 1, 1980 to December 1, 1981 (MDL §281).

The Loft Laws also established an "administrative body" called the "Loft Board" (MDL §282) (the composition and administration of which are fundamentally un-American), which has usurped total control of Owner's buildings. The Loft Board consists of nine members who purportedly represent the "public", the "real estate industry", "loft residential tenants" and

---

[4] Charles Delaney, a loft tenant and officer of LMLTA, was immediately appointed to the "Loft Board", remains as a member today, and votes on all matters affecting his own loft and lease status, and the rent he pays, if any, and the comprehensive regulations this self-serving body has promulgated. - All in total conflict with the lease provisions.

"loft manufacturing interests" and a "chairperson", but, in fact, are all political appointees (with no specific qualifications) of the Mayor of the City of New York, and serve at the mayor's pleasure, for such term and for such compensation as the Mayor may designate; (§282 MDL) The Mayor has appointed only one out of nine members to "represent" the "real estate industry".[5] Four of the nine are loft tenants - thereby controlling the "Loft Board" solely to their own benefit.

The Loft Law "designation" compelled Owner of this retroactively selected building to seek an unwanted and discretionary zoning variance (under pain of criminal and civil penalties), and then totally reconstruct its office/loft building - at huge expense - so as to make it legally, structurally and cosmetically suitable for residential use[6]. Failure to abide by the compliance schedule subjects Owner to criminal and civil sanctions (MDL §284 1-(ii); (§304). The costs of this mandatory zoning variance and major conversion project, are legislatively mandated to be paid by Owner in total violation of the written leases. Meanwhile, Owner was prohibited by the Loft Laws from collecting ANY rent or use and occupancy, or obtaining possession of the premises. (§302-1-(b)); (§283)

Furthermore, not only must Owner totally rebuild its building (with no current rent or use and occupancy being paid by the legislatively, and retroactively rewarded tenants) throughout an involuntary conversion process which will take many years (with occupants in unpaid possession), but Owner can not (*inter alia):* (a) recoup more than an arbitrary portion of the forced conversion

---

[5] The "Loft Board", controlled by the tenants themselves, has the responsibility of determining which buildings are covered by the Loft Law, and has issued comprehensive regulations and rulings on every facet of "loft building" ownership, forced conversion and operation with the actual owner of the building no longer having any real voice in the operation of its building.

[6] Although Owner was required to comply with a rigid timetable (MDL §284 (I)) all these dates expired many years prior to the official "designation" of this building by the Loft Board in 1988.

costs; (b) obtain any interest or return upon the forced capital investment, and/or (c) obtain vacant possession of its premises.

Furthermore, the Loft Laws extinguished or contradicted every substantial provision of the leases for 640 Broadway, including three of the most important terms of any lease: (1) rent; (2) length of lease; (3) bargained for services; and also explicit provisions which obligated tenants to pay for all non-structural or interior repairs, and all required building alterations in the future, either during the term of the lease or any "extension" thereof, especially any arising from tenants use of the premises.[7] The Loft Laws do not define "compliance" under MDL §285(l), but New York courts have rigidly held that an owner must get a final certificate of occupancy as a fully converted residential building in order to collect any rent or use or occupancy. *County Dollar Corp. v. Douglas*, 556 N.Y.S.2d 533 (lst Dept. 1990); *902 Associates, Ltd. V. Total Creative Services*, 547 N.Y.S. 978 (App.Term 1989). There existed no statutory basis for avoiding compliance with the Loft Laws at any time after "designation",, nor at any future time.[8] Owner, declared an "interim multiple dwelling", is retroactively required (under criminal and civil penalties) to reconstruct its building to comply with residential

[7] The likelihood of recoupment of investment, or any return upon the huge forced investment, is greatly diminished by the fact that once a "residential" certificate of occupancy is issued, the building then becomes subject to the rent control provisions of the Emergency Tenant Protection Act of 1974 (MDL286(3)) which imposes strict limits on the amount of rent that may be charged and the tenant is granted an estate that can last for generations yet unborn, and is transferable to strangers, in complete nullification of the lease.

[8] As originally enacted, the Loft Laws contained a purported but illusory mechanism for exemptions from coverage for buildings for which compliance would cause an "unjustifiable" hardship" (not defined) (MDL §285(2)), but it expired by statute in June 1983, before any proceeding was ever commenced to designate this as a "Loft law" building; and those provisions lapsed 5 years prior to the "designation" by the "Loft Board", in 1988, of 640 Broadway.

housing standards (MDL §284). The Loft Laws' designation was the sole, direct and proximate cause of Owner's bankruptcy, since no rent was collectible from occupants using 90% of the building as state-licensed squatters; causing a default and foreclosure proceedings on the substantial first mortgage held by a national savings bank, and bankruptcy filing.

To be in "compliance" with the Loft Laws, Owner also had to apply for a "special permit" under the zoning law, an altered building application", and a building permit, and a new "residential" certificate of occupancy. The necessary government approvals of the numerous plans, permits and applications that must be filed and obtained (subject to numerous discretionary reviews by "Community Planning Boards", various city agencies and the Loft Board) would take years and forced reconstruction to residential use more years, thereafter, to accomplish; Owner is thus legislatively sentenced to both a long interim, and lifetime subsidization of its non-paying former tenants (or strangers) and here, also, total loss of its property rights for more than four years.[9]

In August, 1983, 24 persons who claimed to be illegally living at 640 Broadway filed an application with the Loft Board seeking a determination that 21 units in the building were covered by the Loft Laws. "Coverage" was contested by Owner. So-called "hearings" were conducted by various "hearing officers" (all employees of the City) between March and September 1985. Not one member of the Loft Board was present at any "hearing" to hear testimony or observe the demeanor of the witnesses; and it was uncontroverted that all members of the "Loft Board" serve at the whim and pleasure of the

---

[9] To add injury to insult, the "artist" requirement was deleted by statute in 1987; §281(4)M.D.L, so now anyone who was there in 1980-81 (or their unauthorized successors in 1987), became the gratuitous beneficiary of an imposed long-term lease. This removed the major purported statutory "Justification" for the Loft Laws, the putpotyrf "emergency" need for "artists" housing.

Mayor, at salaries and for terms designated by the Mayor, and that virtually all of the "Loft Board" members had direct personal and financial interests adverse to Owner.[10]

Almost five years after the former tenants' application was filed, and almost six years after the enactment of the Loft Laws, the "Loft Board", in April 1988, determined that 640 Broadway was 'an "interim multiple dwelling" consisting of 20 units covered by the Loft Law[11] . Owner was ordered by the Loft Board to "register" the building. On the grounds that this mandatory "registration"[12] and a forced discretionary zoning variance and forcible residential conversion of the building was unconstitutional, Owner, in 1989, then in Chapter 11, brought an action pursuant to 42 U.S.C. §1983, seeking damages as well as a permanent injunction to prevent defendants from enforcing the Loft Laws and related statutes against Owner. The district court dismissed the complaint herein (*640 Broadway Renaissance Co. v. Cuomo*, 740 F.Sup.1023, *aff'd* 927 F.2d 593; *cert.den'd.* 111 S.Ct.2054, 114 L.E.2d 459 (1991), relying virtually *in toto*, on the Supreme Court dismissal for "want of a

---

[10] Supposedly one of the nine Loft Board members "represents" the "real estate industry" (not even a loft building owner).

[11] The "hearings" were not "due process" hearings procedurally; including that *ex parte* meetings with tenants were secretly held; and staff members created biased evidentiary rules. Although no "Loft Board" member heard any testimony of witnesses - this was a triple "legislative" delegation of power: (1) from legislature to Mayor; (2) from Mayor to "Loft Board" and (3) from Loft Board to "Hearing Officer" (a City employee).

[12] "Registration" requires a forced surrender of fundamental property rights, including an affidavit swearing to provide all "residential" services to non-rent paying former tenants, whether yet defined or thereafter decreed; a delivery of all leases to Loft Board (whether strictly "commercial" or "residential") and other extortionate requirements.

substantial federal question," *of Spring Realty v. New York City Loft Board*, 487 N.Y.S.2d 973 (Sup.Ct. N.Y. Co. 1985), aff'd, 498 N.Y.S. 2d 241 (lst Dept. 1986) modf'd on other grounds, 69 N.Y.2d 657, 511 N.Y.S.2d 830, (1986), *app. dism'd*, 482 U.S. 911, (1987). However: (1) *Spring Realty* was dismissed because it was premature and speculative, and the building had not been "designated" by the Loft Board as an "interim multiple dwelling"; (2) unlike here, no buildings therein had been statutorily barred from collecting rent or yet suffered any actual monetary damage or bankruptcy; and (3) there was no case or controversy yet in existence, for purposes of Federal Court jurisdiction under Article III.

Plaintiff thereafter, under duress, "registered" the building with the Loft Board, and commenced this present action to collect more than four years rent for use and occupancy that was then due. The New York courts have dismissed Plaintiff's complaints on motion for summary judgment, and Plaintiff has no other judicial avenue to require the payment of such rents or use and occupancy; which, if upheld here, results in a forfeiture of Owner's property rights for that period and a legislatively mandated transfer of assets from Plaintiff to Defendants by this retroactive and legislative scheme.

REASONS FOR GRANTING THE WRIT

I -THE LOFT LAWS AS APPLIED HEREIN CONSTITUTE AN UNCONSTITUTIONAL IMPAIRMENT OF PRIVATE CONTRACTS UNDER ART. I, §10

"No State shall...pass any...Law impairing the Obligations of Contracts." The threshold inquiry is whether the law operates as a substantial impairment of the contractual relationship. *Allied Structural Steel Co., v. Spannaus*, 438 US 234. (1978) The severity of impairment

increases the level of scrutiny applied; substantial impact is undeniably present here. Leases, like other contracts;

> "enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Allied Structural*, 438 U.S. at 245.

The Loft Laws totally altered the short-term contractual relationship between tenants and Owner, and superimposed indefinite and crippling monetary and legal obligations on Owner, vastly beyond what Owner agreed to undertake. It is beyond dispute that the Loft Laws repudiated these leases in virtually every way, and were so retroactively designed (MDL §286). Under the Loft Laws former tenants have by State *fiat*: (a) extended their occupancy -most for more than ten (10) additional years already; (b) made unauthorized subdivisions; and sold, assigned and sublet (for windfall profits) their new property "rights" to unpaid occupancy; and (c) otherwise profiteered from Owner's property, by subletting for large sums, and still using the owner's premises rent-free thereby pocketing Plaintiff's rent monies and converting them to the tenants own use, and have become the virtual "owners" of lofts in Owner's building. Virtually every clause of the lease is cavalierly extinguished, including all provisions relating to paying rent, specified repairs and bargained-for services, and the term of the lease. With reckless disregard for the property rights of owner, the Loft Laws shifted economic burdens from tenant to Owner, and (1) transform the short-term commercial relationship (freely entered) into one for which they never bargained: a long time, subsidized residential estate; (2) abrogate virtually all contractual obligations of tenant; including the nullification of the Owner's rights to collect rent (MDL §301 & 302). The Loft Laws also compel Owner, at unconscionable expense, to

totally reconstruct the building into a multiple dwelling (MDL §284), without compensation; and notwithstanding that it is structurally unsuited for residential use, that it is contrary to the applicable zoning, and the building's existing certificate of occupancy. Owner must then (under compulsion of state criminal and civil penalties including imprisonment up to six months, (MDL §304) give the tenant an endless, burdensome residential lease (M.D.L. §284-1(ii)). For a state statute to be reasonable and necessary to serve a legitimate public purpose, it must be enacted to protect a basic societal interest, not merely the personal interest of retroactively selected private individuals. *Allied Structural Steel, supra; Home Bldg. & Loan Assoc. V. Blaisdell*, 290 U.S. 398, (1934) The contracts clause forbids an alteration in the relative position of two parties to an existing contract. *West Indian Trading Co., Ltd. v. Gov't of Virgin Islands*, 844 F.2d 1007 (3rd Cir. 1988); *South Terminal Corp. v. E.P.A.*, 504 F.2d 646, 680 (lst Cir. 1974). Here, there is a total legislative alteration of the rights of parties to a lease and a total abrogation of Plaintiffs contractual rights, vis a vis the former tenants; and legislatively granted years of rent free use by tenants of Plaintiff's property - and what are essentially lifetime estates (or longer) in Plaintiff's building.

In adopting the Loft Laws, the legislature purportedly "found" an "emergency" justified enactment. In reality, the so-called "emergency" which was the basis for the statute, was only that tenants knowingly violated their leases (and criminal statutes) by illegally residing in this building - and then wanted the state-granted "right" to do so in perpetuity, under much more favorable terms. If an "emergency" existed, it was totally self-created by the tenants. The Loft Laws rewarded these specific, identifiable and retroactively selected illegal occupants, by retroactively transferring Owner's property rights to them.

> A state cannot "adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them". *Home Bldg and Loan Assoc. v. Blaisdell, supra*, at 439 (1934).

Here, it is undisputed that the "rent stabilized" residential tenancies forcibly created, could last for generations yet unborn. The nullification of all essential contractual terms, and which effectively grants a perpetual leasehold interest in the premises, is far worse than in *Allied Structural Steel, supra*, especially where Owner is prevented from collecting any rent for an indefinite period (here, four or more years has resulted)

Contracts are not subject to unlimited modifications under the guise of "police power" and must serve a legitimate public purpose. *United States Trust Co. v. New Jersey*, 431 U.S. I at 22 (1977). As the Supreme Court held in *Allied Structural Steel Co. supra*,

> '... thus, the statute in question here nullifies express terms of the company's contractual obligations and imposes completely unexpected liability in potentially disabling amounts." 438 U.S. at 247.

Furthermore, there was no desperate nationwide depression as "justification" here:

> "Moreover, in at least one other important respect the Act does not resemble the mortgage moratorium legislation whose constitutionality was upheld in the *Blaisdell* case. This legislation, imposing a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees was not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions of the early

> 1930's conditions of which the Court in *Blaisdell* took judicial notice." 438 U.S. at 249.

Neither did the Loft Laws:

> "...effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships - irrevocably and retroactively. *Cf. United States Trust v. New Jersey*, 431 U.S.at 22..." *Allied Structural Steel*, 438 U.S. at 249

The Loft Laws retroactively and legislatively, imposed vast losses upon owner, and totally altered the relative position of the parties to an existing lease, and worked a severe, permanent and immediate change in the lease relationship, retroactively and irrevocably. Thus plaintiff retroactively had its legitimate contractual expectations destroyed [13]. Whether by gun or legislative pen, the result is the same [14]. *Nieves v. Hess Oil Virgin Islands Corp.* 819 F.2d 1237 (3rd Cir. 1987). In depriving owner of the long-term ability to obtain rent-paying and legal office tenants, and requiring Owner to suffer long-term estates from non-paying residential tenants (under

---

[13] By imposing a totally new, long-term economic relationship upon Owner, the Loft Laws not only nullified the bargained-for lease expiration date, but also disregarded that, in calculating the rent for the services which Owner agreed to provide to tenants, Owner was never compensated for furnishing a totally rebuilt and reconstructed building plus a panoply of expensive additional "residential" services that are mandated by a myriad of laws and regulations governing 'residential 'tenancies in New York City. *e.g.*

[14] Furthermore, former tenants or current occupants are completely free to leave or skip out at any time during these years-long proceedings (leaving huge rent arrears uncollectible), and have no real obligations to Owner under the Loft Laws. It is interesting to note that although the Loft Laws contain a comprehensive section called "Owner Obligations" (M.D.L.§284), there is no section called "Tenant Obligations".

state license) the Loft Laws totally usurped Owner's fundamental rights.[16]

II-MULTIPLE DWELLING LAW, §§ 301 AND 302, WHICH RETROACTIVELY FORFEITED OWNER'S RENTS FOR MORE THAN FOUR YEARS, IS UN-CONSTITUTIONAL AS APPLIED HERE.

The "Loft Laws" are unconstitutional as applied here, because they retroactively deprived the property owner of THE most fundamental property right, i.e. the right to collect rent. Denying rent collection for an indefinite period, while Owner is forced to apply for unnecessary and self-destructive zoning and certificate of occupancy changes (with numerous hearings, administrative proceedings, and discretionary approvals), and forced reconstruction of its office/loft building into a subsidized apartment house, was a taking of its property rights; its rent was its only source of income.

> . . . But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property - without Paying for the privilege of doing so. Because the Due Process Clause of the

[16] The Loft Laws also deprived Owner of all rights to decide who its tenants would be, and upon what terms. There are occupants who have never had any lease or contractual relationship with Owner (and who have never paid any rent), but the Laws compel Owner to accept strangers and assignees as permanent residential tenants with long-term transferable estates, at their will, and reconstruct the building to their whim, without the payment of any rent and/or use and occupancy.

> Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment." *Hughes v. Washington*, 389 U.S. 290 at 298 (1967); Separate Opinion, Mr. Justice Stewart, concurring.

No business or property owner can survive when the state/city government decrees that "customers" can use or occupy or take owner's property or goods for free (until some future distant time) any more than a candy or shoe store could survive when the legislature decrees that customers can take candy or shoes with no need to pay, in order to remedy some alleged "public" problem.

The Loft Laws, as interpreted by the N.Y. courts herein have decreed that no rent or use and occupancy are collectible for a prolonged period. For real property investment, rent is the sole means of subsistence - its life's blood. The real estate, banking, construction and mortgage industries (and the basic American capitalist system) rest upon the bedrock concept that tenants must pay rent for using and occupying property; without rent, there is no economic value to any real estate investment; here this fundamental property right has been retroactively extinguished and confiscated - transferred as a windfall to specific, politically vocal tenants as a reward for their deliberate illegal acts by retroactive statutory *fiat*[16].

III. THE LOFT LAWS AS HERE APPLIED, VIOLATE THE SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS OF OWNER.

---

[16] *First Eng. Evan. Luth. Ch., supra; Allied Structural, supra, United States v. 'General Motors, supra; cf. Flushing National Bank v. Mun. Assist. Corp., etc.*, 40 N.Y. 2d 731, 390 N.Y.S.2d 22 (1976).

The Loft Laws were not meant to protect the lives or safety of the public generally, but only to augment the property rights of a favored few, retroactively selected (tenants who refused to abide by leases and criminal laws, refused to pay rent or use and occupancy, and refused to vacate when leases ended); their self-created "emergency" was purportedly solved by a legislative transfer of long-term property rights to tenants, in premises which they had merely rented or occupied. A state does not have the constitutional power to seize control of a building and turn it over to former tenants, because tenants want long-term estates (and more) in the Owner's building, under the guise of "regulation". Without a serious constitutional guarantee of property rights, property has no value[17] and builders or investors or lenders won't invest in a state which capriciously and retroactively eviscerates property rights; thus the Loft Laws, if upheld here, would also be very counterproductive to all New York real estate, and the economy, development and employment in New York, and turn New York into a Cuban or Chinese type "democracy". *cf. Flushing Nat. Bank v. MAC, supra.*

Furthermore, the "Loft Board" is an unconstitutional "administrative body"; consisting of nine persons, all appointed by the mayor (with no other approval or consent) serving for such terms, at such salaries as the mayor may designate, and with no specific qualifications of any kind, but supposedly as "representatives" of specific interest groups. (MDL §282. However, eight out of nine members are, by their status, adverse to Owner's property interests[18]. The fundamental ownership rights

---

[17] Here, not only are Plaintiff's property rights seized, but the national bank holding the first mortgage also had the value of its collateral annihilated by retroactive legislative fiat.

[18] The state did not have the constitutional power to make the mayor the Czar of private real estate, and the mayor did not have the constitutional power to further delegate such to a group of

of property cannot be divided among special interest groups, at the mayor's, legislature's or "Loft Board's" whim; "not bound by any official duty, but... free to withhold consent for selfish reasons or arbitrarily, and...subject...to their will or caprice" *Seattle Trust Co. v. Rogerge*, 278 U.S. at 122.

Owner's substantive due process rights were destroyed because 640 Broadway was stripped of all its lease and contract rights, the Owner was retroactively forced into bankruptcy by actual operation and effect of the Loft Laws[19]; forcing Owner to obtain a discretionary "special permit" and retroactively imposing an affirmative obligation of totally reconstructing its building under an "altered building application" is a compulsory zoning variance, unprecedented in the United States[20]. Zoning variances were created to resolve property owners' hardships, not prolong, create or perpetuate them; they are by nature permissive, not mandatory:

> "A variance permits an individual to use his property in a manner which an ordinance, literally enforced, would otherwise prohibit ...Intended to meet situations that can be

---

private individuals, virtually all of whan have direct pecuniary or political interest adverse to the building owner, and financially affected by their own decisions. *See, Gibson v. Berryhill*, 411 U.S. 64 (1973), *Eubank v. Richmond*, 226 U.S.137 (1912); *Washington, ex rel v. Seattle Title Trust Co. Roberge*, 278 U.S.116 (1928)

[19] Furthermore, the Chairman of the Loft Board demonstrated total disdain for the U.S. Constitution by issuing "emergency" regulations of major substance, by himself (without the Loft Board) with no public hearings or opportunity for comment permitted, because the Loft Board Chairman believed: "observance of the requirement for notice and opportunity for comment in writing would be contrary to the public interest".

[20] *cf. Keystone Associates vs. Moerdler, 19* N.Y.2d 78 (Ct.Appeals 1966); *Fred French Investing OD. v. City of New York.* 39 N.Y.2d 587, 385 N.Y.S.2d 5 *cert. denied* 429 U.S. 990. (1976) *Seawall Associates, Ltd., v. City of New York*, 74 NY2d 92 (Ct of Appeals 1989)

> resolved in advance by ordinance, a variance relieves individual property owners from the harsh, unintended, or foreseeable commences of rigid enforcement..." (Cites omitted) *Barbian v. Panagis*, 694 F.2d 476 (7th Cir. 1982).

The retroactive Loft Laws "designation" made it statutorily impossible to collect any rent (for more that four years herein) - created a cloud on title and marketability, and totally annihilated normal investment expectations. *Urbanizadora Versailles, Inc. v. Rios*, 701 F.2d 993 (1st Cir. 1983). The holder of a valid building permit obtains a vested interest therein when he has performed substantial work in reliance upon that permit, *Lefrak Forest Hills Corp. v. Galvin*, 338 NYS2d 932, *aff'd* 32 NY2d 796 (1953); even when there is a subsequent change in zoning or building regulations prior to the completion of the building subject to permit. *Matter of Temkin v. Karaghezoff*, 34 NY2d 324, (1974).

> "It is well settled that one who, in reliance upon a permit validly issued by a municipality in good faith makes substantial improvements and incurs substantial expense in order to make his land suitable for a specific purpose or use, acquires a vested right to such use, even though, by reason of subsequent changes in the zoning ordinances, such use has become a prohibited or non-conforming use." (cites omitted). *Glenel Realty Corp. v. Worthington*, 164 NYS2d, 625, 638 (2d Dept. 1957)

A fortiori, a validly issued certificate of occupancy (only issued upon final completion of work under a building permit) creates vested property rights. Owner of 640 Broadway relied on existing zoning, and the valid 1966 certificate of occupancy , in the purchase and rehabilitation of a then virtually vacant building, which was a continuation of its conforming use as an

office/manufacturing building for more than 90 years. In *Lefrak, supra*, the New York Court of Appeals recognized vested rights in continuation of a particular zoning classification, where there is reliance upon the zoning, and substantial construction work has been done; it held that the installation of a foundation was enough. Here, Owner had a completed, 100 year old office/ manufacturing building, which the zoning always permitted, and still does. Owner had a fundamental right to continue the office/manufacturing use of its building, which is the conforming use, and was the legal use of the building since built, and the city/state cannot constitutionally require Owner to apply for a discretionary zoning regulation; - and in the meantime, forfeit all rent belonging to Owner - and given as a windfall to tenants holding over, and illegally using the property in violation of law and their written leases.

IV - AS APPLIED HERE, THE LOFT LAW IMPOSES A PUNITIVE RETROACTIVE CONFISCATION OF PROPERTY, THEREFORE IT CONSTITUTES AN UNCONSTITUTIONAL BILL OF ATTAINDER OR *EX POST FACTO* LAW

The undisputed facts show that the Loft Laws constitute an unconstitutional Bill of Attainder, or bill of "pains and penalties" included therein, or *ex post facto* law; *i.e.*, legislative punishment for retroactively decreed crimes, *Cummings v. Missouri*, 71 U.S. [4 Wall) 277, 18 L.Ed. 356, (1867). The specific buildings which were retroactively subjected to the Loft Laws, by defendants' admission, were known in advance of enactment, and were retroactively pre-selected from specific membership lists of tenants organizations; the *sine qua non* of the Loft Laws is that the tenant who illegally lived there (or transferee) is rewarded with a long-term estate in the premises at the expense of Owner - and the Owner is deprived of all rent collections for many years. The owners of such buildings were retroactively singled out

for disparate treatment. *United States v. Lovett*, 328 U.S. 303 (1946); *U.S. v. Brown*, 28 U.S. 437 (1965). That the Loft Laws constitute a form of legislative punishment also can not be denied. (MDL §304; §302-1-b; §284-1-ii; §282) Basic property rights have been seized; uncompensated compulsory capital investment of up to Two Million Dollars, and a forced zoning change and repudiation of the certificate of occupancy is not "regulation". Rather, it constitutes punitive confiscation of owner's property, including rent collection, retroactively and legislatively imposed; such non-judicial punishment upon an identifiable group is a violation of the Bill of Attainder and *ex post facto* Clauses.[21] *Cummings V. Missouri, supra.* Furthermore, then-existing punishment for violation of the M.D.L. was fines of $500 or $1,000; the state/city ignored existing law (MDL §304; and passed the Loft Laws instead, inflicting virtual confiscation of the property for the unnamed "crime" of the tenants who deliberately, willfully and illegally lived in a loft owned by Plaintiff. The bill of attainder and *ex post facto* clauses prohibit enactment of laws that either impose punishments for acts not punishable at the time they were committed, or increase punishment over that previously prescribed. *Cummings v. Missouri, supra; Fletcher v. Peck*, 10 U.S. (6 Cranch) 128 (1810).[22]

---

[21] Even though the Loft Law does not contain any definition of the purported "crime", it cannot be denied that Owner has been punished for its pre-enactment "status". The Loft Laws do not depend on whether or not the Owner "knew or constructively knew" about the illegal residential use; all are snared in the same trap if the narrowly defined conditions existed for that preenactment time period (April 1980-December 1981); and the building is permanently ensnared.

[22] *Louis Vuitton, S.A. v. Spencer Handbags* 765 F2d 966 (2nd Cir 1985); *Weaver v. Graham*, 450 U.S. 24 (1981). *Harisades v. Shaughnessy* 342 U.S. 580 (1952); *Deveau v. Braisted* 363 U.S 144 (1960) *cf. People v. Broadway-Sheridan Arms*, 90 N.Y.S.2d 445 (1st Dept. 1949); aff'd. 300 N.Y.S. 59 (1949).

The Loft Laws, if upheld here, have already confiscated four years or more of owners rents, and forced its bankruptcy, but further, now also: (1) compel Owner to undertake complete reconstruction; (2) owner is retroactively stripped of rights to own a lawful commercial building, and (3) substantial property rights are extinguished or rendered valueless, including the Owner's right to choose tenants, or the terms of the tenancy; and/or to negotiate any aspect of any lease at any time in the foreseeable future. This is either a classic Bill of Attainder, or a "bill of pains and penalties," which the Supreme Court has long held as included in the prohibition. *Cummings v. Missouri, supra; Fletcher v. Peck, supra.*

While the Loft Law "findings" contained blanket "indictments" (§280 M.D.L.); the legislative indictment and punishment of 640 Broadway - by the retroactive seizure of control and use of its building - was constitutionally infirm because it constituted a Bill of Attainder or *ex post facto* law.[23]

V - AS APPLIED HERE, THE LOFT LAWS DEPRIVED OWNER OF EQUAL PROTECTION OF THE LAW

In *Hooper V. Bernalillo County Assessor*, 472 U.S. 612 (1985), the Court held a statute unconstitutional because the retroactive distinction between different classes of resident veterans, by the date they moved to New Mexico, was not rationally related to the asserted

---

[23] Even assuming, *arguendo*, that the Owner knew or should have known that the tenants used the premises illegally, there was no justification for retroactive legislative expropriation; There is clearly an presumption of guilt, and a retroactive legislative punishment. *cf. United States v. Brown, supra.* If the Owner committed any crime, the state/city could have prosecuted Owner under existing law, instead; Owner was punished by legislative seizure; furthermore, increasing the penalty for previously committed "wrongs" is also improper law. *Cummings v. Missouri, supra; Fletcher v. Peck,, supra.*

BEST AVAILABLE

there was no rational basis, in June 1982, for treating owners of buildings with illegal residential tenants, during the retroactive and capriciously selected period (April 1, 1980 - December 1, 1981) totally differently from other owners that had residential tenancies either: (a) prior to those dates, or (b), after those retroactively selected dates; both classes of which were exempted[24]; This retroactive classification did not rationally further a legitimate government purpose. The statutory scheme invidiously discriminated in another major way, by excluding buildings owned by a municipality (MDL §281-1 (ii)); there was no rational reason to exclude municipally-owned buildings and there are numerous other discriminatory provisions.

VI - AS APPLIED HERE, DESIGNATION UNDER THE LOFT LAWS AUTHORIZED A PERMANENT PHYSICAL INVASION OF OWNER'S PROPERTY AND CONSTITUTED A TAKING WITHOUT JUST COMPENSATION

This statutory scheme goes "too far" and should be recognized as a taking. *Nollan v. Calif. Coastal Commission*, 483 U.S. 825 (1987). *First English Evan. Luth. Ch. v. Los Angeles Cty*, 482 U.S. 31 4 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987). The decisions of the courts below conflict with express constitutional provisions, and controlling authority of the Supreme Court; *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419,*

---

[24] creating a specially burdened class of building owners and specially privileged class of occupants, distinguished only by the dates of the tenants' willful illegal occupancy, prior to enactment. *City of Cleburn v. Cleburn Living Center*, 473 U.S. 432, (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Plyer v. Doe*, 457 U.S. 202 (1982); *Zobel v. Williams*, 457 U.S. 55 (1982); *United states Department of Agriculture v Moreno*, 413 U.S., 528 (1973); *English v. Town of Huntingtcn*, 448 F.2d 319 2nd Cir. 1971)

COPY

(1982); cf Seawall Associates v. City of N.Y., 74 N.Y.2d 92 (Ct. of App. 1989). Under its valid certificate of occupancy, this building could only be used for manufacturing or office purposes; the net effect of the Loft Laws "designation" was to deprive Owner of its basic property rights, including, but not limited to, precluding Owner from using it in accordance with its existing certificate of occupancy and zoning. Furthermore, the Loft Laws extinguished Owner's rights to collect rent, or use and occupancy, for an indefinite period; here, at least 4 years, and forced Plaintiff into bankruptcy. The Loft Laws also expressly deprived Owner of the right to terminate tenants unpaid use by removing them (MDL 286-1); Owner had a Hobson's choice: (1) if Owner wanted to ever collect rent (at some distant future time), it had to convert the building to a multiple dwelling at huge expense, enter a new business with no means to pay for or finance the reconstruction; or (2) it could not collect any rent, nor ever recover possession of its property; and was subject to criminal and civil penalties anyway. (MDL §304)

Thus, because tenants knowingly and illegally slept in the building in 1980-81, owner is now legislatively stripped of the right to use the building for the only legal use thereof since it was built[25] , and to collect rent from the people using and occupying the building - because of the tenants own illegal acts. The Loft Laws also deprive Owner of the fundamental right to decide how it will invest funds. It was not disputed that to reconstruct the building to comply with applicable multiple dwelling laws, Owner would have a forced expenditure of up to Two

---

[25] The Loft Laws do not apply to any specific zoning map or geography, but are applied on a specific, building-by-building basis retroactively selected to include specific persons and buildings, during that sole arbitrary period of 1980-81; Owner's knowledge or consent is irrelevant.

Million ($2,000,000) Dollars to: (a) obtain a discretionary zoning variance, a special permit," an altered building application and a new certificate of occupancy, none of which it wants or needs; (b) make major structural alterations and improvements, unnecessary for existing legal uses; and (c) permanently convert a presently legal office/manufacturing building into a residential multiple dwelling, to satisfy its former tenants (now squatters who paid no rent for use and occupancy for more than four years) and to suffer the long-term leasehold estates granted them in Owner's property, by this legislation. Owner never authorized perpetual, at will, lease renewals for tenants, with no obligations; the State did that. Owner never authorized occupants to use the premises rent-free; the State did that; thus the state/city confiscated all but the bare legal title of Owner's fee estate. The Constitution prevents a state/city from retroactively imposing permanent legal relationships, to which the owner never agreed or consented, which constitutes a lifetime (or longer) enforceable estate in owner's property, and annihilates its marketability. *Loretto supra; Sederquist v. City of Tiburon*, 265 F.2d 756 (9th Cir. 1984); *Silverman v. Barry*, 727 F.2d 1121 (D.C.Cir. 1984)

Where state action results in the physical occupation of private property, there is a *per se* taking; when the character of the government action

> "is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only a minimal impact on the owner". *Loretto*, 458 U.S. at 434-5.

In *Loretto*, even though the amount of space occupied by cable, wires and boxes was minimal, this was a *per se* taking for which compensation must be paid. Here, the

invasion is vastly more pervasive, virtually total (eight stories out of a nine-story building are totally taken - no rent is collectible for many years -) the income from the balance of the building is sequestered to subsidize the non-paying residential tenants, and complete operational control of the building, and its future use and rental value are usurped. The Loft Laws demand that owners of certain (approximately 800) arbitrarily and retroactively selected commercial buildings, acquiesce to permanent occupation of their property by illegal residential tenants and squatters. Incredibly, the *sine qua non* of this legislation is the tenants' deliberate pre-enactment illegal use. Owner here executed short leases (which expired long ago); the challenged statutes retroactively require Owner to permit the long-term physical occupation of its building by third parties, and an affirmative obligation to reconstruct the building to tenants' whims at Owner's expense without compensation - while being unable to collect rent while the tenants squatted in Owner's property, subleased and "sold" their "rights", and demanded vastly different and increased "services" than the leases agreed to provide - while at the same time, and extinguishing virtually every provision of the lease that benefited owner. *Loretto, supra; Kaiser Aetna v. U.S.*, 444 U.S. 164, (1979); *Herrington v. Sonoma County*, 834 F.2d 1488 (9th Cir. 1987).

Here, Owner's rights to decide who occupies its property and upon what terms are asphyxiated. The owners rights to collect any rent for many years is retroactively usurped and taken - and given as a windfall to former tenants.

"The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto*, 458 U.S. at 426.

Loft Laws "designation" extinguished owner's rights to possess, rent or use its own building or exclude

squatters or occupants from long term unpaid possession or use. Even a temporary taking creates the constitutional obligation to pay just compensation. *First Eng. Evan Lutheran Church v. Los Angeles, supra; United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). *Sawyer v. U.S. Steel et al*, 197 F.2d 582, aff'd 343 U.S. 579 (1952).

Here, the Loft Laws constituted a *per se* taking, in violation of the 5th and 14th Amendments.

VII - THERE WERE NUMEROUS ISSUES OF FACT PRECLUDING SUMMARY JUDGMENT

Plaintiff was denied due process by the court's granting of summary judgment in the face of numerous material issues of fact, including (1) whether Plaintiff complied with (or even had to comply with) the statutory requirements of the Loft Law within various legislative time periods; (2) the issue of Plaintiff's involuntary withdrawal, in 1985, of its "special permit" application from the City Planning Commission, which was, in fact, not voluntary, but caused solely by changes in the law in 1985 that withdrew the City Planning Commission's authority to grant such permit; and (3) whether Plaintiff took all reasonable and necessary steps to obtain a Certificate of Occupancy as then required, and (4) numerous other critical factual matters. The New York Courts relied upon an attorney's affidavit, filled with speculation and surmise, as to such facts, and erroneously denied Plaintiff its day in court thereupon. Furthermore, the New York Courts erroneously denied Plaintiff's motion to amend its complaint herein, and improperly assumed that all the factual allegations of Defendants' motion papers were true, even though made by an attorney, and even though sharply disputed; again, this totally deprived Plaintiff of its day in Court.

In granting summary judgment, the IAS Court also erroneously dismissed the third cause of action based

Contrary to the Court's statement that there was "no evidence" that the tenants had breached any provisions of their leases, there was voluminous evidence, which must be deemed true upon motion for summary judgment.[28] Furthermore, discovery would have uncovered the true physical layouts and occupancies of the units, all of the details of the illegal sublettings and profiteering by tenants, and the facts to establish constructive trusts over the funds tenants misappropriated from Plaintiff, specifically because many of them had been subdivided without Owner's permission.

CONCLUSION

This case represents fundamental questions of nationwide importance regarding basic property rights, and a writ of certiorari should be granted; if the property rights provisions of the Constitution and the Bill of Rights are eviscerated or rendered meaningless, as here, by retroactive state/city legislation, then the investment value of all commercial real estate in the nation (which is totally dependent upon rent income) is substantially diminished.

The Petition for a writ of certiorari should be granted.

Dated: New York, N.Y.
December 5, 1995

Respectfully submitted,

MARTIN R. FINE
Respectfully submitted,
Attorney for Petitioner
644 Broadway
New York, N. Y. 10012
(212) 477-0715

---

[28] *cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)(courts forbidden to make credibility determinations on summary judgment); *Hardin v. Pitney-Bowes, Inc.*, 451 U.S.1008 (1981) (Rehnquist, J., dissenting from denial of certiorari)("summary judgment simply may not be granted when such matters as the defendant's motive and intent are questioned.

APPENDIX A — ORDER OF THE NEW YORK COURT OF APPEALS DATED SEPTEMBER 7, 1995

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of September 1995

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-10 Mo. No. 773

640 Broadway Renaissance Co.,

Appellant,

v.

John Eisner, et al.,

Respondents,

and 15 Other Cases Consolidated
for Purposes of a Joint Appeal.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed

from does not finally determine the action within the meaning of the Constitution.

s/ Stuart M. Cohen
Stuart M. Cohen
Deputy Clerk of the Court

APPENDIX B — DECISION AND ORDER OF THE SUPREME COURT APPELLATE DIVISION FIRST DEPARTMENT ENTERED FEBRUARY 7, 1995

Murphy, P.J., Sullivan, Rosenberger, Ross, JJ.,

53934-49 640

Broadway Renaissance Co., B.H. Wiener

Plaintiff-Appellant,

-against-

John Eisner, et al., D. Ratner

Defendant-Respondents,

-and-

15 Other Cases Consolidated for
Purposes of a Joint Appeal.

Sixteen orders, Supreme Court, New York County (Joan Lobis, J.) entered on or about November 15, 1993, which granted defendants' motions for summary judgment dismissing the complaint, directed the Clerk to enter judgment accordingly, and denied plaintiff's cross-motion for discovery sanctions, leave to amend pleadings and related relief without prejudice to plaintiff's commencing proceedings in Civil Court for prospective rent and on the basis of any claim of illegal subletting, and to seek discovery in those actions concerning alleged subletting, unanimously affirmed, with one bill of costs.

Appendix B

To collect rent on the subject loft units, plaintiff owner was required to be in compliance with the Loft Law (Multiple Dwelling Law §§285[1], 302[1][b]). The plaintiff withdrew its application for a necessary special permit that would have brought the subject building into compliance with the Loft Law, and then never sought to renew the application, despite a Loft Board order. It therefore cannot claim the benefits of 1992 amendments to the statute (*see, Goho Equities v. Weiss*, 149 Misc 2d 628, 630), and cannot seek the benefits of the 1992 amendments to the statute retroactively (*Grossman v. MKF Realty Corp.*, 203 AD2d 129). As to the prospective claims for rent and illegal subletting and attendant discovery needs, it was not an abuse of discretion for the IAS court to conclude that Civil Court was the appropriate venue (*see, Sims v. Manley*, 120 AD2d 405, *affd*, 69 NY2d 912).

We have considered the plaintiff's remaining arguments, and find them to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 7, 1995

s/ Catherine O'Hagan Wolfe
CLERK

APPENDIX C — DECISION OF THE SUPREME COURT OF NEW YORK COUNTY OF NEW YORK DATED JULY 12, 1993

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 20

Index Nos. 23830/92,
23831/92, 23832/92,
23833/92, 23834/92,
23835/92, 23836/92,
23837/92, 23839/92,
23840/92, 23941/92,
23842/92, 23843/92,
23844/92, 23845/92,
and 29602/92.

540 BROADWAY RENAISSANCE CO.,

Plaintiff,

-against-

JOHN EISNER, ET AL.,

Defendants.

Decision

JOAN B. LOBIS, J.S.C.

The plaintiff landlord has commenced sixteen identical actions against various tenants of the building for non-payment of rent, for damages for subjecting the premises to the provisions of the loft law and for attorneys' fees. The tenants have each

Appendix C

brought a motion for summary judgment dismissing the complaint. The landlord has brought a cross-motion in each of the actions for an order: (1) striking the answers of each defendant on the ground that they have failed to comply with discovery, (2) awarding sanctions for the alleged willful conduct of defendants, (3) amending the complaint to add a cause of action for constructive trust, (4) amending the reply, and (5) directing the payment of use and occupancy prospectively. All of the motions are hereby consolidated for disposition. For the reasons stated below, defendants' motion for summary judgment dismissing the complaints are granted and plaintiff's cross-motion is denied except that any claim for prospective rent may be commenced by the plaintiff in Civil Court.

The building in which the defendants are tenants is a nine story building located at the corner of Bleecker and Broadway. In April 1988, the New York City Loft Board determined that the building is an interim multiple dwelling subject to Article 7-C of the Multiple Dwelling Law (the "Loft Law"). The owner of the building was ordered to register the premises as an interim multiple dwelling with the Loft Board. The order also stated that continued coverage of the premises was contingent upon the granting of a special permit by the City Planning Commission. The decision of the Board has never been appealed and the time in which to make such an appeal has long since expired. As of August 1992, plaintiff had done nothing to comply with its legalization obligations under the Loft Law.

The Loft Law, as originally enacted, required subject owners to bring their buildings up to code as Class A Multiple Dwellings within a specified timetable set out in Multiple Dwelling Law ("MDL") section 284. The owner was permitted to collect rent during the legalization process on the condition that the owner

register the building with the Loft Board and comply with the legalization timetable set out in MDL section 284. If the owner did not register the building or comply with the legalization schedule set out in the Loft Law, the owner was not entitled to collect rent. *See County Dollar Corporation v. Douglas*, 160 A.D.2d 537 (1st Dep't 1990).

In 1992, there was a major legislative overhaul of the Loft Law. The Loft Law now provides that landlords who have failed to comply with the previous requirement to obtain a residential certificate of occupancy in accordance with the requirements of section 284.1 (i) shall hereafter be deemed in compliance with the Loft Law provided that the owner complies with the new timetable laid out in the statute for upgrading the building and obtaining a certificate of occupancy. The statute now provides that "an owner who has not complied with the requirements of paragraph (i) of this subdivision by the effective date of the chapter of the laws on nineteen hundred ninety-two which added this paragraph shall hereafter be deemed in compliance with this subdivision provided that such owner files an alteration application by October first, nineteen hundred ninety-two. . . ." and complies with the other subsequent requirements contained therein. Pursuant to the amendments to the statute, an owner can now collect rent even though the building is not yet in compliance with the prior requirements of the statute as the owner is "deemed in compliance hereafter" as long as the owner complies with the subsequent steps set out in the statute.

Since the time that the statute was amended, the owner of the building has filed an alteration application with the Loft Board. It therefore claims that it is entitled to rent on a prospective basis. Any such claim for ongoing rent should be commenced in the Civil Court. There is no reason that the Supreme Court should

retain jurisdiction over the owner's claim for rent on a prospective basis.

The landlord's claim for rent on a retroactive basis is denied. It is undisputed that the owner of the building was not in compliance with the requirements of the Loft Law prior to the recent amendments as it had not even registered the building. It therefore had no right to collect rent: *See Dollar, supra.* Although plaintiff argues that the amendments to the Loft Law should be retroactively applied, this court has previously held that the amendments to the Loft Law do not allow the owner of the building to collect rent on a retroactive basis. *Grossman v. MKF Realty Corp.*, N.Y.L.J. Oct. 20, 1992, p. 21, col. 6 (Sup. Ct. N.Y. Co.). This Court held in *Grossman* that:

> Although the owner is entitled to rent on an ongoing basis as long as it complies with the new requirements set out in section 284.1 (ii), there is no basis for the landlord's request for retroactive rent. The amended statute provides that the owner "shall hereafter be deemed in compliance with this subdivision. . . ." Thus, prior to the date of the amendment, the owner was not in compliance with the requirements of the law. As this Court noted in it prior decision, the First Department has held that an owner of an interim multiple dwelling is not entitled to collect rent in the absence of compliance by the owner with the loft law. *See County Dollar Corporation v. Douglas, 160 A.D.2d 537* (1st Dep't 1990).

Appendix C

Plaintiff's argument that it was in compliance with the provisions of the Loft Law prior to the amendments is rejected. According to plaintiff, the statutory timetables originally set forth in the Loft Law did not take effect for the building until plaintiff obtained a special permit. Since plaintiff never obtained a special permit, it claims that it has always been in compliance with the Loft Law. What plaintiff fails to acknowledge in its argument is that the only reason plaintiff never obtained a special permit for the building is that plaintiff withdrew its application for a special permit. For an owner to obtain a special permit, it must apply to the City Planning Commission. Although plaintiff made an application, it withdrew it in 1985 while the hearings were proceeding before the Loft Board. The Loft Law specifically provides that a landlord "shall take all reasonable and necessary action to obtain a certificate of occupancy as a Class A multiple dwelling" within three years of the effective date of the Loft Law. Here, plaintiff violated the foregoing provision of the Loft Law by failing to pursue and actually withdrawing its application for a special permit. Thus, plaintiff was clearly not in compliance with the provisions of the Loft law prior to the amendments as a result of its own inaction. Thus, there is no basis for its claim for retroactive rent.

Plaintiff has also asserted a cause of action against the tenants for subjecting it to the provisions of the Loft Law. Plaintiff's claim is based on the indemnification clause of the leases. These clauses are standard indemnification clauses which provide that the tenant will indemnify the owner for damages caused by any breach of the tenant of the provisions of the leases or damages claimed by persons as a result of work performed by or on behalf of the tenant. There is no basis for this cause of action as a matter of law and it is dismissed. Initially, there is no evidence that the tenant has breached any provision of the lease.

Appendix C

Secondly, there is no evidence that the landlord has suffered damages in the traditional sense as a result of the work performed by the tenants on their individual lofts. The provision of the lease with respect to indemnification is meant to come into play when a third party is injured as a result of work being performed by or for the tenant on the tenant's premises. Similar in purpose to the provisions requiring insurance coverage, this clause is a risk allocation requiring tenants to indemnify the landlord for any claims against the landlord for damages arising from acts performed by or on behalf of the tenants. It was not intended to apply to a situation, such as the present one, where the Legislature has enacted a law providing that certain buildings are subject to the Loft Law as a matter of public policy. It is not any action or inaction on the part of tenants which has caused landlord damages — it is the enactment of the Loft Law by the New York State Legislature. To hold otherwise would be contrary to the language of the leases and would be violative of public policy.

Similarly, the plaintiff's motion to amend its complaint to add a cause of action for constructive trust is denied on the ground that plaintiff cannot state a cause of action for a constructive trust. If the landlord believes that any of the tenants have illegally subletted their apartments, it should commence an action in Civil Court with respect to such illegal sublets. Otherwise, there is no legal basis for the plaintiff's claim that it is entitled to recover rent which the legislature and the courts have expressly held that it is not entitled to.

Finally, there is no basis for plaintiff's argument that summary judgment is inappropriate on the ground that it requires discovery. Plaintiff has not shown any discovery it requires which would merit a denial of defendants' motions for summary judgment. To the extent that plaintiff requires discovery about

alleged illegal subletting, it should make application or move to obtain such discovery in Civil Court in connection with any claim it may have against a particular tenant based on an illegal sublet.

Settle order.

July 12, 1993

s/ JBL
JOAN B. LOBIS, JSC

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK DATED NOVEMBER 10, 1993

At IAS Part 20 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse located at 60 Centre Street, New York, New York, on the 10 day of November 1993

Index No. 23830/92

PRESENT:

HON. JOAN B. LOBIS
Justice

640 BROADWAY RENAISSANCE CO.,

Plaintiff,

-against-

JOHN EISNER, MAUREEN EISNER, "JOHN" OR "JANE" TRINGALE, "JOHN DOE" AND "JANE DOE",

Defendants.

ORDER

Defendants, having duly moved this Court for an Order, pursuant to CPLR 3212, for summary judgment, and for such other and further relief as is just and proper, and plaintiff 640

Appendix D

Broadway Renaissance Co. having duly cross-moved for an Order: (a) striking defendant's Answer or alternatively compelling defendants to appear for depositions and vacating the automatic stay of discovery pursuant to CPLR 3214 (b); (b) requiring defendants to pay sanctions for their willful conduct; (c) amending the complaint to add a cause of action for constructive trust; (d) amending plaintiff's Reply to add and affirmative defense and a denial to defendant's fourth counterclaim; (e) directing the payment of use and occupancy prospectively; and (f) for such other and further relief as the Court deems just and proper, and the motion and cross-motion having regularly come on to be heard on June 25, 1993.

NOW, upon reading and filing the Notice of Motion dated January 6, 1993, the Affidavit of Joel Hinman in support of the motion, sworn to on January 6, 1993, the Reply Affirmation of David Ratner dated March 26, 1993, in further support of the motion, and the exhibits annexed thereto, and upon reading and filing the Notice of Cross-Motion, dated February 17, 1993, and the Affirmation of Bruce H. Wiener dated February 17, 1993, and the Affidavit of George Peters, sworn to on February 17, 1993, in support of the cross-motion, and the Reply Affirmation of Bruce H. Wiener dated April 29, 1993, and the Reply Affidavit of George Peters, sworn to on April 29, 1993, and the exhibits annexed thereto, and the Complaint and Answer to the Complaint and Counterclaims heretofore served herein, all with proofs of due service, and Bruce H. Wiener having duly appeared in support of the cross-motion and in opposition to the motion, and David Ratner having appeared in support of the motion and in opposition to the cross-motion, and after due deliberation having been had and this Court having rendered its decision, in writing, dated July 12, 1993, it is

Appendix D

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted; and it is further

ORDERED that plaintiff's cross-motion is denied without prejudice to plaintiff commencing proceedings in Civil Court for any claim for prospective rents, and without prejudice to plaintiff commencing proceedings in Civil Court in connection with any claim of illegal subletting and moving therein to obtain discovery in connection with any such claim of illegal subletting; and it is further

ORDERED that the plaintiff's complaint is dismissed and the clerk is directed to enter judgment in favor of the defendants.

ENTER:

s/ JBL
J.S.C.

APPENDIX E — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK DATED NOVEMBER 10, 1993

At IAS Part 20 of The Supreme Court of The State of New YOrk, held in and for the County of New York, at the Courthouse located at 60 Centre Street, New York, New York, on the 10 day of November 1993

Index Nos: 23821/92;
23832/92; 23833/92;
23834/92; 23835/92;
23836/92; 23837/92;
23839/92; 23840/92;
23841/92; 23842/92;
23843/92; 23844/92;
23845/92; and 29602/92

PRESENT:

HON. JOAN B. LOBIS
Justice

640 Broadway Renaissance Co.,

Plaintiff

-against-

ORDER

All orders indentical to index number 23830/92

APPENDIX F — COMPLAINT IN THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK DATED OCTOBER 9, 1992

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 23830/92

640 BROADWAY RENAISSANCE CO.,

Plaintiff,

-against-

JOHN EISNER, MAUREEN EISNER, "JOHN" OR "JANE" TRINGALE, "JOHN DOE" AND "JANE DOE",

Defendants.

COMPLAINT

Plaintiff, 640 BROADWAY RENAISSANCE CO., by its attorneys Fischbein • Badillo • Wagner • Itzler, as and for its Complaint against defendants JOHN EISNER, MAUREEN EISNER, "JOHN" OR "JANE" TRINGALE, "JOHN DOE" AND "JANE DOE" alleges:

1. Plaintiff 640 Broadway Renaissance Co. ("plaintiff" or "Renaissance Co.") is a partnership organized and existing under the laws of the State of New York with offices located at c/o Horatio Management Corp., 644 Broadway, New York, New York.

Appendix F

THE PARTIES

2. Upon information and belief, defendant John Eisner ("Eisner") was and is the tenant of a certain loft known as Unit No. 2E, in the building known as 640 Broadway, New York, New York (the "premises").

3. Upon information and belief, defendants Maureen Eisner, "John" or "Jane" Tringale, now claimed to be "Gasper" Tringale, "John Doe" and "Jane Doe" are possible undertenants in occupancy of the premises whose true identities are not known to Renaissance Co.

BACKGROUND

4. Upon information and belief, Eisner was and is the tenant of the premises who entered into possession thereof under a written rental agreement, dated December 31, 1980, by and between Renaissance Co. and Eisner (the "Agreement"), wherein Eisner promised to pay to Renaissance Co. certain rent and additional rent specified in the Agreement, in advance, on a monthly basis on the first day of each month for use of the premises.

5. That although the premises was initially rented for commercial purposes, upon information and belief, the premises has been used, and is continuing to be used for dwelling purposes.

6. That subsequent to the execution of the Agreement, Eisner, without the permission and/or consent of Renaissance Co., permitted defendants Maureen Eisner, "John" or "Jane" Tringale, now claimed to be "Gasper" Tringale, "John Doe" and/or "Jane Doe" to occupy the premises.

7. That the premises are currently subject to Article 7-C of the Multiple Dwelling Law, commonly known as the Loft Law, as amended, and Renaissance Co. has duly registered the premises with the New York City Loft Board and is in compliance with the statute.

AS AND FOR A FIRST CAUSE OF ACTION

8. That plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "7" as if more fully set forth below.

9. That defendants, notwithstanding the unambiguous terms of the Agreement, have failed and refused to pay rent or additional rent to plaintiff, or use and occupancy for the premises.

10. That through and including August 31, 1992, defendants have failed to pay rent and additional rent totalling at least Fifty-Nine Thousand Seven Hundred Ninety-Three and 13/100 ($59,793.13) Dollars.

11. That by reason of defendants' breach of the Agreement, and their use and occupancy of the premises, plaintiff has sustained damages in an amount to be determined by the court, but not less than Fifty-Nine Thousand Seven Hundred Ninety-Three and 13/100 ($59,793.13) Dollars.

AS AND FOR A SECOND CAUSE OF ACTION

12. That plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "11" as if more fully set forth below.

13. That by reason of the foregoing, plaintiff was required to

engage, and has engaged, counsel to enforce its rights under the Agreement.

14. That in accordance with paragraphs "19" and "57" of the Agreement, defendants are liable for payment of attorneys' fees and expenses incurred by plaintiff, where defendants violate any covenant contained in the Agreement, including but not limited to, defendants' obligation to pay rent and additional rent.

15. That by reason of defendants' breach of the Agreement, plaintiff has incurred attorneys' fees and expenses, and will continue to incur attorneys fees and expenses in an amount not less than Twenty-Five Thousand ($25,000.00) Dollars.

AS AND FOR A THIRD CAUSE OF ACTION

16. That plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "15" as if more fully set forth below.

17. That in accordance with paragraphs "8" and "40" of the Agreement, defendants are required to indemnify plaintiff against and from any and all liabilities, obligations, damages, penalties, claims, costs and expenses, including but not limited to attorneys' fees, as a result of any breach by defendants of the provisions of the Agreement.

18. That defendants have breached the Agreement by, among other things, illegally converting the premises for dwelling purposes, causing violations to be placed on the premises, and subjecting the premises to the provisions of the Loft Law.

19. That by virtue of defendants' breach of the Agreement,

plaintiff has incurred substantial costs and expenses, and will continue to incur such costs and expenses, in an amount to be determined by this court, but not less than Fifty Thousand ($50,000.00) Dollars.

WHEREFORE, plaintiff respectfully requests that the court enter judgment as follows: (a) on the first cause of action, damages in the amount of Fifty-Nine Thousand Seven Hundred Ninety-Three and 13/100 ($59,793.13) Dollars; (b) on the second cause of action, damages in the amount of not less than Twenty-Five Thousand ($25,000.00) Dollars; (c) on the third cause of action, damages in the amount of not less than Fifty Thousand ($50,000.00) Dollars; (d) interest, from August 26, 1986, through the date judgment is entered; and (e) for such other and further relief as this Court deems just and proper, together with the costs and disbursements of this action.

Dated: New York, New York
October 9, 1992

Yours etc.,

FISCHBEIN • BADILLO • WAGNER • ITZLER
Attorneys for Plaintiff
909 Third Avenue
New York, New York 10022
(212) 826-2000

TO: HARTMAN, ULE, ROSE & RATNER
Attorneys for Defendant
Gasper Tringale named as "John" Tringale
305 Broadway
New York, New York 10007
(212) 437-9110

APPENDIX G — MULTIPLE DWELLING LAWS

Section

280. Legislative findings.
281. Definition of "interim multiple dwelling".
282. Establishment of special loft unit.
283. Occupancy permitted.
284. Owner obligations.
285. Owner protection.
286. Tenant protection.
287. Alternative compliance.

§ 280. Legislative findings.

The legislature hereby finds an declares that a serious public emergency exists in the housing of a considerable number of persons in cities having a population of over one million which emergency has been created by the increasing number of conversions of commercial and manufacturing loft buildings to residential use without compliance with applicable building codes and laws and without compliance with local laws regarding minimum housing maintenance standards; that many such buildings do not conform to minimum standards for health, safety and fire protection; that housing maintenance services essential to maintain health, safety and fire protection are not being provided in many such buildings; that as a consequence of the acute shortage of housing as found and declared in the emergency tenant protection act of nineteen seventy-four[1] the tenants in such buildings would suffer great hardship if forced to relocate; that as a result of the uncertain status of the tenancy in question the courts have been increasingly burdened with disputes between landlords and tenants regarding their respective rights and obligations under

the existing circumstances; that some courts have declared such buildings "de facto" multiple dwellings; that illegal and unregulated residential conversions undermine the integrity of the local zoning resolution and threaten loss of jobs and industry; that the intervention of the state and local governments is necessary to effectuate legalization, consistent with the local zoning resolution, of the present illegal living arrangements in such "de facto" multiple dwellings, and to establish a system whereby residential rentals can be reasonably adjusted so that residential tenants can assist in paying the cost of such legalization without being forced to relocate; that in order to prevent uncertainty, hardship, and dislocation, the provisions of this article are necessary and designed to protect the public health, safety and general welfare.

§ 281. Definition of "interim multiple dwelling"

1. Except as provided in subdivision two of this section, the term "interim multiple dwelling" means any building or structure or portion thereof located in a city of more than one million persons which (i) at any time was occupied for manufacturing, commercial, or warehouse purposes; and (ii) lacks a certificate of compliance or occupancy pursuant to section three hundred one of this chapter; and (iii) on December first, nineteen hundred eighty-one was occupied for residential purposes since April first, nineteen hundred eighty as the residence or home of any three or more families living independently of one another.

2. Notwithstanding the definition set forth in subdivision one of this section, the term "interim multiple

dwelling" includes only (i) buildings, structures or portions thereof located in a geographical area in which the local zoning resolution permits residential use as of right, or by minor modification or administrative certification of a local planning agency, (ii) buildings or structures which are not owned by a municipality, (iii) buildings, structures or portions thereof within an area designated by the local zoning resolution as a study area for possible rezoning to permit residential use, or (iv) buildings, structure or portions thereof which may be converted to residential use pursuant to a special permit granted by a local planning agency. In the case of classes of buildings specified by paragraphs (iii) and (iv) of this subdivision and those buildings specified by paragraph (i) of this subdivision which require a minor modification or administrative certification, however, the provisions of subdivision one of section two hundred eighty-four of this article regarding compliance with this chapter shall not be applicable, but the other provisions of this article shall be applicable. Upon rezoning of any such study area or the granting of any such special permit, minor modification or administrative certification to permit residential use of any such building or portion thereof, subdivision one of section two hundred eighty-four of this article shall be applicable, with the timing of compliance requirements set forth in such section commencing to run upon the effective date of such rezoning or permit approval. If such rezoning does not permit residential use of the building or a portion thereof, or if a special permit, minor modification or administrative certification is denied, such building shall be exempt from this article.

3. In addition to the residents of an interim multiple dwelling, residential occupants in units first occupied after

April first nineteen hundred eighty and prior to April first, nineteen hundred eighty-one shall be qualified for protection pursuant to this article, provided that the building or any portion thereof otherwise qualifies as an interim multiple dwelling, an the tenants are eligible under the local zoning resolution for such occupancy. A reduction in the number of occupied residential units in a building after December first, nineteen hundred eighty-one shall not eliminate the protections of this article for any remaining residential occupants qualified for such protections. Non-residential space in a building as of the effective date of the act which added this article[1] shall be offered for residential use only after the obtaining of a residential certificate of occupancy for such space, and such space shall be exempt from this article, even if a portion of such building may be an interim multiple dwelling.

4. Interim multiple dwellings shall also include buildings, structures or portions thereof that had residential occupants on May first, nineteen hundred eighty-seven in units occupied residentially since December first, nineteen hundred eighty-one that were occupied for residential purposes since April first, nineteen hundred eighty and those units shall be qualified for protection pursuant to this article, provided that the building or any portion thereof meets the requirements set out in subdivision one of this section, regardless of whether the buildings, structures or portions thereof meets the requirements set out in paragraphs (i), (iii) and (iv) of subdivision two of this section.

§ 282. Establishment of special loft unit

In order to resolve complaints of owners of interim multiple dwellings and of residential occupants of such

Appendix G

buildings qualified for the protection of this article, and to act upon hardship applications made pursuant to this article, a special loft unit referred to herein as the "loft board" shall be established which shall consist of from four to nine members representative of the public, the real estate industry, loft residential tenants, and loft manufacturing interests, and a chairperson, all to be appointed by the mayor of the municipality and to serve such terms as he may designate. The compensation of the members of the loft board shall be fixed by the mayor. The members of the loft board shall not be considered employees of the state or the municipality, provided, however, that state or municipal employees, or officers may be named to the loft board. The mayor shall establish the loft board within ninety days of the effective date of the act which added this article[1] The loft board shall have such office and staff as shall be necessary to carry out functions conferred upon it and may request and receive assistance from any state or municipal agency or department. The loft board shall have the following duties: (a) the determination of interim multiple dwelling status and other issues of coverage pursuant to this article; (b) the resolution of all hardship appeals brought under this article; (c) the determination of any claim for rent adjustment under this article by an owner or tenant; (d) the issuance, after a public hearing, and the enforcement of rules and regulations governing minimum housing maintenance standards in interim multiple dwellings (subject to the provisions of this chapter and any local building code), rent adjustments prior to legalization, compliance with this article and the hearing of complaints and applications made to it pursuant to this article; and (e) determination of controversies arising over the fair market value or a residential tenant's fixtures or reasonable moving expenses. The violation of any rule or regulation promulgated

by the loft board shall be punishable by a civil penalty determined by the loft board not to exceed one thousand dollars which may be recovered by the municipality by a proceeding in any court of competent jurisdiction. The loft board may charge and collect reasonable fees in the execution of its responsibilities. The loft board may administer oaths, take affidavits, hear testimony, and take proof under oath at public or private hearings.

§ 283. Occupancy permitted

Notwithstanding any other provision of this chapter or any other law code, rule or regulation, occupancy for residential purposes of residential units covered by this article is permitted, if such occupancy is in compliance with this article. Nothing contained herein shall be construed to limit local authorities from issuing vacate order for hazardous conditions, if appropriate.

§ 284. Owner obligations

1. (i) The owner of an interim multiple dwelling (A) shall file an alteration application within nine months from the effective date of the act which added this article[1], and (B) shall take all reasonable and necessary action to obtain an approved alteration permit within twelve months from such effective date, and (C) shall achieve compliance with the standards of safety and fire protection set forth in article seven-B of this chapter for the residential portions of the building within eighteen months from obtaining such alteration permit or eighteen months from such effective date, whichever is later, and (D) shall take all reasonable and necessary action to obtain a certificate of occupancy as a class A multiple dwelling for the

residential portions of the building or structure within thirty-six months from such effective date. The loft board may, upon good cause shown, and upon proof of compliance with the standards of safety and fire protection set forth in article seven-B of this chapter, twice extend the time of compliance with the requirement to obtain a residential certificate of occupancy for periods not to exceed twelve months each.

(ii) If there is a finding by the loft board that an owner has failed to satisfy any requirement specified in paragraph (i) of this subdivision, such owner shall be subject to all penalties set forth in article eight of this chapter.

(iii) In addition to the penalties provided in article eight of this chapter, if there is a finding by the loft board that an owner has failed to satisfy any requirement specified in paragraph (i) of this subdivision, a court may order specific performance to enforce the provisions of this article upon the application of three occupants of separate residential units qualified for the protection of this article, or upon the application of the municipality.

(iv) If, as a consequence of an owner's unlawful failure to comply with the provisions of paragraph (i) of this subdivision any residential occupant qualified for protection pursuant to this article is required to vacate his unit as a result of a municipal vacate order, such occupant may recover from the owner the fair market value of any improvements made by such tenant, and reasonable moving costs. Any vacate order issued as to such unit by a local government shall be deemed an order to the owner to correct the non-compliant conditions, subject to the provisions of this article. Furthermore, when such correction has been made such occupant shall have the

right to re-occupy his unit, and shall be entitled to all applicable tenant protections of this article.

(v) The occupants of a building shall, upon appropriate notice regarding the timing and scope of the work required, afford the owner reasonable access to their units so that the work necessary for compliance with this article can be carried out. Failure to comply with an order of the loft board regarding access shall be grounds for eviction of a tenant.

2. Every owner of an interim multiple dwelling, every lessee of a whole building part of which is an interim multiple dwelling, and every agent or other person having control of such a dwelling, shall, within sixty days of the effective date of the act which added this article[1], file with the loft board or any other authority designated by the mayor a notice in conformity with all provisions of section three hundred twenty-five of this chapter and with rules and regulations to be promulgated by the loft board.

§ 285. Owner protection

1. Notwithstanding the provisions of section three hundred two or three hundred twenty-five of this chapter, the owner of an interim multiple dwelling may recover rent payable from residential occupants qualified for the protection of this article on or after April first, nineteen hundred eighty, and maintain an action or proceeding for possession of such premises for non-payment of rent, provided that he is in compliance with this article.

2. Notwithstanding any other provision of this article, an owner may apply to the loft board for exemption of a

building or portion thereof from this article on the basis that compliance with this article in obtaining a legal residential certificate of occupancy would cause an unjustifiable hardship either because: (i) it would cause an unreasonably adverse impact on a non-residential conforming use tenant within the building or, (ii) the cost of compliance renders legal residential conversion infeasible. Residential and other tenants shall be given not less than sixty days notice in advance of the hearing date for such application. If the loft board approves such application, the building or portion thereof shall be exempt from this article, and may be converted to non-residential conforming uses, provided, however, that the owner shall, as a condition of approval of such application, agree to file an irrevocable recorded covenant in form satisfactory to the loft board enforceable for fifteen years by the municipality, that the building will not be re-converted to residential uses during such time. The standard for granting such hardship application for a building or portion thereof shall be as follows: (a) the loft board shall only grant the minimum relief necessary to relieve any alleged hardship with the understanding if compliance is reasonably possible it should be achieved even if it requires alteration of units, relocation of tenants to vacant space within the building, re-design of space or application for a non-use-related variance, special permit, minor modification or administrative certification; (b) self-created hardship shall not be allowed; (c) the test for cost infeasibility shall be that of a reasonable return on the owner's investment not maximum return on investment; (d) the test for unreasonably adverse impact on a non-residential conforming use tenant shall be whether residential conversion would necessitate displacement.

Such hardship applications shall be submitted to the loft board within nine months of the establishment of the loft board (or, in the case of interim multiple dwellings referred to in subdivision

four of section two hundred eighty-one of this chapter, within nine months of the effective date of that subdivision)[1], but shall not be considered, absent a waiver by the loft board, unless the owner has also filed an alteration application. In determination of any such hardship application, the loft board may demand such information as it deems necessary. In approving any such hardship application, the loft board may fix reasonable terms and conditions for the vacating of residential occupancy.

3. An owner of an interim multiple dwelling shall be exempt from paying a conversion contribution required by the zoning resolution of the city of New York for that portion of any building or structure determined by the loft board to be an interim multiple dwelling.

§ 286. Tenant protection

1. It shall not be a ground for an action or proceeding to recover possession of a unit occupied by a residential occupant qualified for the protection of this article that the occupancy of the unit is illegal or in violation or provisions of the tenant's lease or rental agreement because a residential certificate of occupancy has not been issued for the building, or because residential occupancy is not permitted by the lease or rental agreement.

2. Prior to compliance with safety and fire protection standards of article seven-B of this chapter, residential occupants qualified for protection pursuant to this article shall be entitled to continued occupancy, and shall pay the same rent, including escalations, specified in their lease or rental agreement to the extent to which such lease or rental agreement remains in effect or, in the absence of a lease or rental agreement, the same rent most recently paid and accepted by

Appendix G

the owner; if there is no lease or other rental agreement in effect, rent adjustments prior to article seven-B compliance shall be in conformity with guidelines to be set by the loft board for such residential occupants within six months from the effective date of this article[1].

3. Upon or after compliance with the safety and fire protection standards of article seven-B of this chapter, an owner may apply to the loft board for an adjustment of rent based upon the cost of such compliance. Upon approval by the loft board of such compliance, the loft board shall set the initial legal regulated rent, and each residential occupant qualified for protection pursuant to this article shall be offered a residential lease subject to the provisions regarding evictions and regulation of rent set forth in the emergency tenant protection act of nineteen seventy-four,[2] except to the extent the provisions of this article are inconsistent with such act. At such time, the owners of such buildings shall join a real estate industry stabilization association in accordance with such act.

4. The initial legal regulated rent established by the loft board shall be equal to (i) the rent in effect, including escalations, as of the date of application for adjustment ("base rent"), plus, (ii) the maximum annual amount of any increase allocable to compliance as provided herein; and (iii) the percentage increase then applicable to one, two or three year leases as elected by the tenant, as established by the local rent guidelines board, and applied to the base rent, provided, however, such percentage increases may be adjusted downward by the loft board if prior increases based on loft board guidelines cover part of the same time period to be covered by the rent guidelines board adjustments.

Appendix G

5. An owner may apply to the loft board for rent adjustments once based upon the cost of compliance with article seven-B of this chapter and once based upon the obtaining of a residential certificate of occupancy. If the initial legal regulated rent has been set based only upon article seven-B compliance, a further adjustment may be obtained upon the obtaining of a residential certificate of occupancy. Upon receipt of such records as the loft board shall require, the loft board shall determine the costs necessarily and reasonably incurred, including financing, in obtaining compliance with this article pursuant to a schedule of reasonable costs to be promulgated by it. The adjustment in maximum rents for compliance with this article shall be determined either (i) by dividing the amount of the cash cost of such improvements exclusive of interest and service charges over a ten year period of amortization, or (ii) by dividing the amount of the cash cost of such improvements exclusive of interest and service charges over a fifteen year period of amortization, plus the actual annual mortgage debt service attributable to interest and service charges in each year of indebtedness to an institutional lender, or other lender approved by the loft board, incurred by the owner to pay the cash cost of the improvements, provided that the maximum amount of interest charged includable in rent shall reflect an annual amortization factor of one-fifteenth of the outstanding principal balance. Rental adjustments to each residential unit shall be determined on a basis approved by the loft board. An owner may elect that the loft board shall deem the total cost of compliance with this article to be the amounts certified by the local department of housing preservation and development of such municipality in any certificate of eligibility issued in connection with an application for tax exemption or tax abatement to the extent such certificate reflects categories of

costs approved by the loft board as reasonable and necessary for such compliance. Rental adjustments attributable to the cost of compliance with this article shall not become part of the base rent for purposes of calculating rents adjusted pursuant to rent guidelines board increases.

6. Notwithstanding any provision of law to the contrary, a residential tenant qualified for protection pursuant to this chapter may sell any improvements to the unit made or purchased by him to an incoming tenant provided, however, that the tenant shall first offer the improvements to the owner for an amount equal to their fair market value. Upon purchase of such improvements by the owner, any unit subject to rent regulation solely by reason of this article and not receiving any benefits of real estate tax exemption or tax abatement, shall be exempted from the provisions of this article requiring rent regulation if such building had fewer than six residential units as of he effective date of the act which added this article[1], or rented at market value subject to subsequent rent regulation if such building had six or more residential units at such time. The loft board shall establish rules and regulations regarding such sale of improvements which shall include provisions that such right to sell improvements may be exercised only once for each unit subject to this article, and that the opportunity for decontrol or market rentals shall not be available to an owner found guilty by the loft board of harassment of tenants.

7. The local rent guidelines board shall annually establish guidelines for rent adjustments for the category of buildings covered by this article in accordance with the standards established pursuant to the emergency tenant protection act of nineteen seventy-four[2]. The local rent guidelines board shall consider the necessity of a separate

category for such buildings, and a separately determined guideline for rent adjustment for those units in which heat is not required to be provided by the owner, and may establish such separate category and guideline. The loft board shall annually commission a study by an independent consultant to assist the rent guidelines board in determining the economics of loft housing.

8. Cooperative and condominium units occupied by owners or tenant-shareholders shall not be subject to rent regulation pursuant to this article.

9. No eviction plan for conversion to cooperative or condominium ownership for a building which is, or a portion of which is an interim multiple dwelling shall be submitted for filing to the department of law pursuant to the general business law until a residential certificate of occupancy is obtained as required by this article, and the residential occupants qualified for protection pursuant to this article are offered one, two or three year leases, as elected by such persons, in accordance with the provisions for establishment of initial legal regulated rent contained herein. Non-eviction plans for such buildings may be submitted for filing only if the sponsor remains responsible for compliance with article seven-B and for all work in common areas required to obtain a residential certificate of occupancy. Cooperative conversion shall be fully in accordance with section three hundred fifty-two-eeee of the general business law, the requirements of the code of the local real estate industry stabilization association, and with the rules and regulations promulgated by the attorney general.

10. The functions of the local conciliation and appeals board of such municipality regarding owners and tenants

subject to rent regulation pursuant to this article shall be carried out by the loft board until such time as provided otherwise by local law.

11. Residential occupants qualified for protection pursuant to this article shall be afforded the protections available to residential tenants pursuant to the real property law and the real property actions and proceedings law.

12. No waiver of rights pursuant to this article by a residential occupant qualified for protection pursuant to this article made prior to the effective date of the act which added this article[1] shall be accorded any force or effect; however, subsequent to the effective date an owner and a residential occupant may agree to the purchase by the owner of such person's rights in a unit.

13. The applicability of the emergency tenant protection act of nineteen seventy-four[2] to buildings occupied by residential tenants qualified for protection pursuant to this article shall be subject to a declaration of emergency by the local legislative body. In the event such act expires prior to the expiration of this article[3], tenants in interim multiple dwellings shall be included in coverage of the rent stabilization law of nineteen hundred sixty-nine of the city of New York[5].

§ 287. Alternative compliance

In any case in which a local building code or this chapter provides an alternative means of meeting the fire and safety standards of article seven-B of this chapter, an owner of an interim multiple dwelling may, to the extent permitted by such local code or this chapter, elect to comply with the

standards of such code or this chapter rather than with article seven-B. Such an election shall not affect an owner's obligations to meet the deadlines for compliance set forth in this article, and in such cases references herein to article seven-B shall be deemed to include any such local building code or the applicable provisions of this chapter.

* * *

MULTIPLE DWELLING LAW

§ 301. Certificate of compliance or occupancy

1. No multiple dwelling shall be occupied in whole or in part until the issuance of a certificate by the department that said dwelling conforms in all respects to the requirements of this chapter, to the building code and rules and to all other applicable law, . . .

* * *

2. Except as above provided, no dwelling constructed as or altered or converted into a multiple dwelling after April eighteenth, nineteen hundred twenty-nine, shall be occupied in whole or in part until the issuance of a certificate of compliance or occupancy.

* * *

§ 302. Unlawful occupation

1. a. If any dwelling or structure be occupied in whole or in part for human habitation in violation of section three hundred one, during such unlawful occupation any bond or

note secured by a mortgage upon said dwelling or structure, or the lot upon which it stands, may be declared due at the option of the mortgagee.

b. No rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefor, or for possession of said premises for non-payment of such rent.

c. During such period the department in charge of water supply shall not permit water to be furnished in any such dwelling or structure and said premises shall be deemed unfit for human habitation, and the department of health or the department charged with the enforcement of this chapter shall cause them to be vacated.

* * *

§ 304. Penalties for violations

1. Except as otherwise in this section specifically provided, every person who shall violate or assist in the violation of any provision of this chapter shall be guilty of a misdemeanor punishable, for a first offense, by a fine of not exceeding five hundred dollars or by imprisonment for a period of not exceeding thirty days, or by both such fine and imprisonment; for the second and any subsequent offense arising from the failure to remove the violation upon which the first offense was based, by a fine of not exceeding one thousand dollars or by imprisonment for a period of not exceeding six months, or by both such fine and imprisonment.

* * *

Appendix G

§ 306. Judicial procedure and orders

1. In case any multiple dwelling or structure or any part thereof or the lot on which it is situated is constructed, altered, converted or maintained in violation of any provision of this chapter or of any order or notice of the department, or in case a nuisance exists in any such dwelling or structure or part thereof or upon the lot on which it is situated, the department may institute any appropriate action or proceeding to prevent such unlawful construction, alteration, conversion or maintenance, to restrain, correct or abate such violation or nuisance, to prevent the occupation of said dwelling or structure or any part thereof, or to prevent any illegal act, conduct or business in or about such dwelling, structure or lot.

2. In any such action or proceeding the department may, by affidavit setting forth the facts, apply to the supreme court, or to any justice thereof, or, if the premises in respect to which the action is brought are situated in the city of New York, to the New York city civil court, for:

a. An order granting the relief for which said action or proceeding is brought, or enjoining all persons from doing or permitting to be done any work in or about such dwelling, structure or lot or any part thereof, or from occupying or using the same for any purpose, until the entry of final judgment or order.

b. An order authorizing the department to execute and carry out the provisions of any notice or order which is issued by the department and not complied with, to remove any violation specified in such notice or order, or to abate any nuisance in or about such dwelling, structure or lot.

* * *

Appendix G

§ 309. Repairs, vacation and demolition of buildings.

1. a. The term "nuisance" shall be held to embrace public nuisance as known at common law or in equity jurisprudence. Whatever is dangerous to human life or detrimental to health, and whatever dwelling is overcrowded with occupants or is not provided with adequate ingress and egress or is not sufficiently supported, ventilated, sewered, drained, cleaned, or lighted in reference to its intended or actual use, and whatever renders the air or human food or drink unwholesome, are also severally, in contemplation of this law, nuisances. All such nuisances are unlawful.

b. Whenever the department shall certify that any multiple dwelling, or any part of its premises, or the plumbing, sewerage, drainage, lighting or ventilation thereof, is in a condition or in effect dangerous to life or health, the department may, after giving notice to the owner and an opportunity to be heard at a hearing held for such purpose declare the same, to the extent it may specify, a public nuisance. . . .

* * *

c. The department may order or cause such nuisance to be removed, abated, suspended, purified, altered, repaired or otherwise improved as the order shall specify.

d. The department may order or cause any multiple dwelling or any part of its premises, or any excavation, structure, sewer, plumbing, pipe, passage, matter or thing in or about such premises to be purified, cleansed, disinfected, removed, altered, repaired or improved.

APPENDIX H — LOFT BOARD REGULATIONS

LOFT BOARD

PURSUANT TO
SECTION 1105 OF THE
NEW YORK CITY CHARTER, Article 7-C of the Multiple Dwelling Law, and Mayor's Executive Order No. 66, The New York City Loft Board hereby promulgates the following Rules and Regulations Relating to Processing of Hardship Applications pursuant to Section 285(2) and the Charging and Collection of Fees pursuant to Section 282 of the Multiple Dwelling Law.

I. *Procedures*

A. *Who May File*

1. The owner of an interim multiple dwelling registered with the Loft Board may file an application for exemption of a building or portion thereof from Article 7-C of the Multiple Dwelling Law on the basis that compliance in obtaining a residential certificate of occupancy would cause hardship for any of the reasons set forth in Section II below.

2. A lessee of a whole building, any portion of which is an interim multiple dwelling registered with the Loft Board, may file an application for exemption from Article 7-C, provided that no application filed by a lessee shall be considered by the Loft Board unless the owner of the building consents in writing to the filing of such application.

3. A duly authorized agent (including the attorney) of the owner of an interim multiple dwelling registered with the Loft Board may file an application for exemption on behalf of the owner.

Appendix H

B. *Filing Deadline*

1. Notices of application for exemption due to hardship for a building or portion thereof must be submitted to the Loft Board by no later than June 30, 1983 pursuant to Section 285(2) of the Multiple Dwelling Law. Such notices shall be filed by letter from the owner, lessee of the whole building or agent and shall only be accepted for buildings registered or which by June 30, 1983 had applied to register as interim multiple dwellings with the Loft Board.

2. The applicant must perfect his/her/its application by no later than October 31, 1983.

C. *Perfecting Hardship Applications*

1. An application shall only be accepted for a building with a current interim multiple dwelling registration.

2. The application shall be in a form acceptable to the Loft Board and shall be consistent with the requirements of these regulations, the Board's regulations relating to applications to the Board (Regulations for Internal Procedures - Section VI, paragraphs 16-25), and to fees (Section 4.B.2.). The applicant must provide all information necessary or appropriate by no later than October 31, 1983 in order for the application to be considered. An additional time period of no more than sixty days for the submission of all required documentation in support of the completed application may be requested and will be granted if good cause is shown. The applicant must indicate the basis for the application, the residential units for which exemption is being applied for, and the specific claims for exemption being made. In addition,

supporting data must be provided with the application whenever necessary or appropriate to fully set forth to explain the basis for the application.

3. In processing the application, the Loft Board may demand such additional information as it deems necessary or appropriate in making a determination. Failure of the applicant to provide any such information required by the Loft Board may result in the denial of the application.

4. Applications for exemption shall not be considered unless the owner has also filed an alteration application with the Department of Buildings. A copy of such alteration application must accompany each hardship application including two copies of the submitted plans and such additional copies of the plans as the Board may require. The Loft Board may vote to waive the requirement that an alteration application be filed and proceed with the consideration of the application for exemption. The approval of such a waiver shall apply only to the consideration of a hardship application and shall in no way affect the owner's obligation to file an alteration application for all other purposes as required by Section 284 of the Multiple Dwelling Law.

a. In deciding whether to waive the requirements that an alteration application be filed, the Board will consider the following criteria: (i) whether the information that would be contained in the alteration application is already available in other records or could be made available in an alternate form acceptable to the Board; and (ii) whether hardship can be proved without the information contained in the alteration application.

Appendix H

5. Processing of an owner's application for exemptions shall be in accordance with the rules regarding application to the Board (Regulations for Internal Board Procedures - Section VI, paragraphs 16-25), except as set forth below. These rules provide for the service of the application on all affected parties, opportunity to answer in writing, and the conducting of informal conferences and administrative hearings.

If a perfected application appears to the staff to be well founded, there shall be conducted an administrative hearing following notice as provided pursuant to Internal Board Procedures at least sixty days in advance of the hearing date.

II. *Processing of Application for Exemption Due to Hardship*

A. *Basis for Application*

The basis for applying for an exemption due to hardship is that compliance with Article 7-C of the Multiple Dwelling Law in obtaining a legal residential certificate of occupancy would cause cause hardship for one of the following two reasons.

1. *Adverse Impact* - Compliance would cause an unreasonably adverse impact on a non-residential conforming use occupant existing on June 21, 1982 within the building.

2. Infeasible Costs - The cost of compliance would render legal residential conversion financially infeasible.

Appendix H

B. *Appropriate Tests*

1. *Adverse Impact* - The test for unreasonably adverse impact on a non-residential conforming use occupant existing on June 21, 1982 shall be whether legal residential conversion would necessitate displacement of such occupant. An owner making a claim on this basis will be required to produce as part of the application, evidence to substantiate the claim. Displacement of non-residential conforming use occupants, may include instances where: (i) all or a critical portion, adversely affecting the conduct of business, of the space of an existing non-residential conforming use occupant would be lost as a result of the residential conversion; (ii) the nature of an existing non-residential conforming use would render legal residential conversion to be infeasible or illegal by causing an imminent peril to the health and safety of residential occupants; (iii) the result of the legal residential conversion would be unreasonably disruptive to the business of the non-residential conforming use; or (iv) the inability of an owner who purchased the building before June 21, 1982 to expand his/her/its business which is an existing non-residential conforming use due to legal residential conversion would result in the elimination of existing jobs.

2. *Infeasible Costs* - The test for cost infeasibility shall be that the owner would be unable to attain a reasonable return on his/her/its investment; not maximum return on investment.

(a) Reasonable rate of return on the owner's investment shall be defined as a net annual return of five percent or more where net annual return is the percentage

Appendix H

amount by which the annual gross earned income from the building exceeds the annual operating expenses of the building.

(b) Earned income shall mean the maximum annual collectible rent for the building, including any and all escalators, for both residential and non-residential units, plus miscellaneous income from all other sources in the building including vending machines, and sign rentals. The Loft Board shall impute a rental value for vacant units or units occupied either residentially or non-residentially by the landlord, any member of the landlord's family or an employee of the landlord, at the fair market value for the space, or if subject to Article 7-C at the maximum legal rent.

(c) Operating expenses shall consist of the actual, reasonable cost of: fuel, labor, utilities, taxes other than income or corporate franchise taxes, fees, permits, necessary contracted services and non-capital repairs, insurance, parts and supplies, management fees and other administrative costs and interest on a bona fide mortgage. Criteria to be considered in determining a bona fide mortgage other than an institutional mortgage shall include: condition of the property, location of the property, the existing mortgage market at the time the mortgage is placed, the term of the mortgage, security and other terms and conditions of the mortgage.

(d) No application shall be approved unless the owner's equity in such building exceeds five percent of: (i) the arms length purchase price of the property; (ii) the cost of any capital improvement for which the owner has not collected or will not collect a surcharge; (iii) any repayment of principal of any mortgage or loan used to finance the purchase of the property or, any capital improvement for which the owner has

not collected or will not collect a surcharge; and (iv) any increase in the equalized assessed value of the property after purchase by the owner. For the purposes of this paragraph, owner's equity shall mean the sum of (i) the purchase price of the property less the principal of any mortgage or loan used to finance the purchase of the property, (ii) the cost of any capital improvement for which the owner has not collected or will not collect a surcharge less the principal of any mortgage or loan used to finance said improvement, (iii) any repayment of the principal of any mortgage or loan used to finance the purchase of the property or any capital improvement for which the owner has not collected or will not collect a surcharge, and (iv) any increase in the equalized assessed value of the property which occurred subsequent to the first valuation of the property after purchase by the owner.

An owner making a claim on this basis will be required to produce, as part of the application, evidence, subject to audit, based on a representative consecutive 12 month period beginning no earlier than January 1, 1982, of the current net annual return for the building and the projected net annual return following legalization including, but not limited to, current and projected earned income, operating expenses and equity information.

Inability to make a reasonable return on investment may include situations where the necessary and reasonable costs of compliance will cause residential units to rent at above prevailing market levels.

C. *Processing Guidelines*

1. Applications for exemption due to hardship will not be granted if the result of self-created hardship.

2. Applications for exemption due to hardship will not be granted if compliance can be reasonably achieved through:

(i) alteration of units,

(ii) relocation of tenants (residential or non-residential conforming use) to vacate space within the building,

(iii) re-design of space, or

(iv) application for a non-use related variance, special permit, minor modification or administrative certification.

Owners filing hardship application shall be required to make a reasonable attempt to cooperate with the tenants to achieve compliance through the methods listed above.

3. In considering such application, the Loft Board shall require the owner and tenants to consider constructive suggestions for alternatives to the proposed legalization plan, which would allow for a minimum vacating of residential occupancy, without adversely affecting existing non-residential conforming uses.

III. *Granting of Applications*

A. In resolving applications for exemption due to hardship, the Loft Board shall grant only the minimum relief necessary to relieve any hardship.

B. If the Loft Board approves an application for exemption due to hardship, the building or portion thereof for

which the application is approved shall be exempt from Article 7-C of the Multiple Dwelling Law and may be converted to non-residential uses which must be in conformance with the zoning resolution and compatible with existing residential use. As a condition of approval of such application, the owner shall file with the Loft Board a certified copy of an irrevocable recorded covenant in form satisfactory to the Loft Board enforceable by the City of New York for fifteen (15) years from the date of the recording, that the building or portion thereof for which the hardship exemption has been granted will not be re-converted to residential uses during that time.

When the Loft Board approves such an application, the owner will be notified of the Board's intent to approve the application and will be afforded an opportunity of no more than 90 days to file the required covenant. The Loft Board will issue its final order approving the application following receipt of the certified copy of the covenant. If proof of the filing of the required covenant is not filed with the Loft Board within 90 days, the application will be denied and the owner will be required to comply with Article 7-C of the Multiple Dwelling Law.

C. If the hardship exemption is granted for a portion of the building, the IMD status for such building and the remaining residential units, covered under Article 7-C of the Multiple Dwelling Law in such building, shall not be affected, even if there are less than three qualified units remaining.

D. In approving an exemption application due to hardship, the Loft Board may fix reasonable terms and conditions regarding the owner's payment to the residential occupant of any reasonable moving costs and the fair market

Appendix H

value of any improvements made or purchased by the residential occupant; and a reasonable time period for relocation, not to exceed one year.

Amendment to the Fee Regulation

Section 4. Fees

B. 2. *Hardship Applications* - the filing fee for an exemption application due to hardship shall be $1,000 for each building or portion thereof for which the application is filed. The fee must be paid by no later than October 31, 1983, the deadline for perfection of hardship applications.

Explanation

These regulations will establish procedures and criteria for processing hardship applications made to the Loft Board pursuant to Section 285(2) and will establish a filing fee for hardship applications pursuant to Section 282 of Article 7-C of the Multiple Dwelling Law.

I do hereby certify that good cause exists for waiving the requirement that thirty days shall first elapse after publication in THE CITY RECORD and that the foregoing Regulations shall become effective on the date of publication.

Dated: August 19, 1983

Filed with the City Clerk: August 26, 1983

s/s Carl B. Weisbrod
CARL B. WEISBORD
CHAIRMAN

APPENDIX I — EXCERPTS OF THE UNITED STATES CONSTITUTION

Article I

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

* * *

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J — OPINION IN *902 ASSOCIATES, LTD. v. TOTAL PICTURE CREATIVE SERVICES, INC. AND PETER SCHNEIDER*

144 Misc.2d 316

902 ASSOCIATES, LTD.,
Petitioner-Landlord-Appellant,

v.

TOTAL PICTURE CREATIVE SERVICES, INC.
and Peter Schneider
Respondents-Tenants-Respondents.

Supreme Court, Appellate Term,
First Department.

July 6, 1989.

* * *

Before OSTRAU, P.J., and SANDIFER and McCOOE, JJ.

PER CURIAM:

Order entered December 23, 1987 (Taylor, J.) affirmed, with $10 costs.

[1] The issue is whether compliance with Multiple Dwelling Law section 284, subdivision 1 must be pleaded and proven in order to successfully maintain a nonpayment proceeding against an occupant of an interim multiple dwelling. We hold that it must.

This nonpayment summary proceeding was brought upon a petition which alleges the status of the building

premises as an "interim multiple dwelling" under Article 7-C of the Multiple Dwelling Law. The premises were originally registered with the Loft Board in November, 1983.

While the owner of an interim multiple dwelling may recover rent from residential loft occupants notwithstanding the rent-forfeiture provisions of the Multiple Dwelling Law applicable to owners of dwellings occupied without a certificate of occupancy, this right is contingent upon the loft building owner's "compliance" with Multiple Dwelling Law section 284 (see MDL §285, subd. 1). One of the primary "owner obligations" under section 284 is the filing and/or obtaining of appropriate alteration applications and permits, and the taking of "all reasonable and necessary action" to obtain a certificate of occupancy within 36 months from June 21, 1982, the effective date of the Loft Law (MDL §284, subd. 1[i]). The petition does not allege the requisite compliance with the Loft Law's owner obligations and is jurisdictionally defective (see *Blackgold Realty Corp. v. Milne*, 69 N.Y.2d 719, 512 N.Y.S.2d 25, 504 N.E.2d 392). Moreover, it is undisputed that the owner has not complied with the time requirements of section 284. There is no showing that the owner has taken any steps to bring the subject premises into compliance.

[2] The owner's argument that mere registration of the building as an interim multiple dwelling entitles it to collect rent misperceives the goal underlying the statutory scheme. The Loft Law permits actions for rent in the absence of a residential certificate of occupancy but the owner is required to move forward on his plans to legalize the premises within the time periods specified in the statute. The law does not contemplate a situation where owners will be permitted to collect rent while the building languishes indefinitely as an "interim" multiple

dwelling. At some point — and the statute expressly defines the time period — an "interim" multiple dwelling must be upgraded to a class A multiple dwelling. To the extent an owner requires extensions of the time to comply, or to the extent the cost of compliance renders legal residential conversion infeasible, an owner is authorized to apply to the Loft Board for relief (MDL § 284, subd. 1[i]; § 285, subd. 2).

We appreciate that this is not an isolated case and that the dynamics of loft conversion are such that there are many dwellings which have not been legalized in conformity with the time schedule originally set by the Legislature. Any claimed inequities should be addressed to the Legislature. This Court is charged with enforcing the statute as written. The language of the statute setting forth a timetable is clear and unequivocal and not subject to judicial interpretation.

Accordingly, inasmuch as the owner has failed to allege or demonstrate compliance with Multiple Dwelling Law § 284, subd. 1, a nonpayment summary proceeding may not be maintained and the petition was properly dismissed by the Civil Court.

OSTRAU, P.J., dissents in the accompanying memorandum.

OSTRAU, Presiding Justice, dissenting.

I respectfully dissent and would reverse the order appealed from and reinstate the petition in this non-payment proceeding.

By virtue, inter alia, of the acute housing shortage in this City, residential tenants, particularly during the 1970's,

gravitated to space available in commercial loft buildings. Many of these "loft tenants" entered into conventional commercial loft leases which were little more than contrivances calculated to disguise the residential use to be made of the premises.

Multiple Dwelling Law §§ 301 and 302 forbid an owner from recovering rent from tenants of a multiple dwelling which lacks a valid certificate of occupancy. In *Lipkis v. Pikus*, 99 Misc.2d 518, 416 N.Y.S.2d 694 (Riccobono, J. dissenting) [AT1], affd. 72 A.D.2d 697, 421 N.Y.S.2d 825, lv. to app. denied 51 N.Y.2d 874, 433 N.Y.S.2d 1019, 414 N.E.2d 399, the Appellate Term, First Department confronted some of the anomalies arising from the residential use of commercial loft premises. Recognizing that landlords and tenants had to some extent acted in concert in unlawfully converting commercial loft premises to residential use, the Appellate Term majority reversed the dismissal of non-payment proceedings notwithstanding tenants' assertion and proof that the premises there at issue lacked valid residential certificates of occupancy. Indeed, in Lipkis, the Appellate Term majority (in spite of the proscription of MDL §§ 301 and 302 against a landlord's recovering of rent from tenants of a multiple dwelling lacking a valid certificate of occupancy) awarded final judgment in favor of the landlord, stayed that judgment until such time as the landlord obtained valid certificates of occupancy, and directed the tenants to deposit with the Clerk of the Court of original jurisdiction any and all arrears in rent as well as accruing use and occupancy at the rate previously payable as rent, with those funds to be released to the landlord upon his securing residential certificates of occupancy. In so doing, the Appellate Term majority observed:

"The pervasive extent of the problem confronting

> us is best illustrated by a report of the Department of City Planning (received in evidence) indicating that fewer than 10% of the industrial buildings located in Manhattan which have undergone total or partial conversion have valid certificates of occupancy for residential use. It seems obvious that the Multiple Dwelling Law provision under review did not envision a situation involving wholesale conversion of commercial properties precipitated by shifting patterns of industrial use and a resurgent demand for mixed residential/commercial space. In this context, we are not persuaded that the implicit condonation of widespread rent withholding actions, or "strikes", is the most feasible and equitable alternative to bring converted properties within the applicable multiple dwelling guidelines. That goal would be better achieved by the more stringent enforcement of building and zoning standards by the appropriate city agencies. In our discretion, however, we have conditioned enforcement of the final judgment granted herein upon petitioner's procurement of the requisite certificate of occupancy. We view this relief as giving balance to the competing interests of both parties by avoiding unjust enrichment to the tenants and stimulating expeditious completion of the actions necessary to legalize the conversion.", (Lipkis v. Pikus, 99 Misc.2d 518, 520-521, 416 N.Y.S.2d 694 [AT1]).

The Appellate Term's formulation in the Lipkis case has been superseded by the passage of Article 7-C of the Multiple Dwelling Law (§§ 280-287) [L.1982, C. 349, § 1]. MDL § 280, characterizes the public emergency giving rise to the enactment of Multiple Dwelling Law Article 7-C, and further provides:

> ....the intervention of the state and local

> governments is necessary to effectuate legalization.... of the present illegal living arrangements in such "de facto" multiple dwellings, and to establish a system whereby residential rentals can be reasonably adjusted so that residential tenants can assist in paying the cost of such legalization without being forced to relocate; that in order to prevent uncertainty, hardship, and dislocation, the provisions of this article are necessary and designed to protect the public health, safety and general welfare.

To maintain existing rent rolls of interim multiple dwellings, MDL § 285(l) was promulgated to provide:

> Notwithstanding the provisions of section three hundred two or three hundred twenty-five of this chapter, the owner of an interim multiple dwelling may recover rent payable from residential occupants qualified for the protection of this article on or after April first, nineteen hundred eighty, and maintain an action or proceeding for possession of such premises for non-payment of rent, provided that he is in *compliance* with this article. (emphasis added)

The instant proceeding was dismissed by the court of original jurisdiction upon the ground that notwithstanding the issuance of an interim multiple dwelling registration number for the premises, the landlord was not in "compliance" with MDL Article 7-C. MDL § 284 provides, inter alia, a schedule for owners of interim multiple dwellings to legalize their premises. Admittedly, the landlord in the instant proceeding has failed to meet the statutory schedule for securing a residential certificate of occupancy for the premises, and because of that failure the court of original jurisdiction concluded that the landlord is not in "compliance" with MDL Article 7-C and thus not entitled to maintain this non-payment proceeding against the tenant (MDL §285[1]).

However, to so strictly construe MDL § 285, subdivision 1, is to ignore the ramifications of MDL § 282, wherein the legislature provided for the creation of a "loft board" to assume jurisdiction over the myriad complexities which confront landlords of loft premises in meeting their obligation to secure residential certificates of occupancy for their premises. Very few interim multiple dwellings in this City have been legalized, and of those few that have been legalized, most are cooperative premises in which the proprietary's lessees have had an obvious economic incentive to undertake such legalization.

The simple fact of the matter is that the Appellate Term majority, in affirming the dismissal of this non-payment proceeding, has now jeopardized the rent roll of almost every interim multiple dwelling in this City. The majority's holding in this case is manifestly more restrictive than even the Appellate Term's earlier formulation in the Lipkis case, and it raises the specter of bankruptcy for most interim multiple dwellings. To my view, the majority's holding represents an overly restrictive construction of Article 7-C, particularly since Article 7-C is primarily designed to guarantee the rent roll so necessary if services are to be provided and if the orderly legalization of interim multiple dwellings is to proceed. It is most significant that the loft board itself, with its broad powers to regulate interim multiple dwellings, has not suggested that the tenants of the interim multiple dwellings which have not been legalized in accordance with the schedule provided by MDL § 284(1) which as indicated above constitute the vast majority of interim multiple dwellings in this City are now completely relieved of the obligation to pay rent.

The tenant in this proceeding has not suggested that the

landlord has failed to provide services or that the premises have deteriorated. To my view, and in the absence of a determination by the loft board to the contrary, the landlord is entitled to recover rent for the premises at issue and to maintain this nonpayment proceeding, (cf., *Corris v. 129 Front Co.*, 85 A.D.2D 176, 447 N.Y.S.2D 480 [Sandler, J. dissenting in part]). To suggest, as does the majority, that the answers to the immediate questions raised by this appeal are to be found in the legislature, is to defer to the problematic, to defy experience and to afford no relief for the significant dislocation which the majority's holding will certainly cause.

APPENDIX K — OPINION IN *COUNTY DOLLAR CORPORATION v. ELISE DOUGLAS, et al.*

COUNTY DOLLAR CORPORATION,
Petitioner-Landlord-Appellant,

v.

Elise DOUGLAS et al.,
Respondents-Tenants-Respondents.

Supreme Court, Appellate Division,
First Department.

April 19, 1990.

* * *

Before KUPFERMAN, J.P., and ROSS, ROSENBERGER and WALLACH, JJ.

MEMORANDUM DECISION.

Order, Appellate Term, First Department (Stanley S. Ostrau, P.J., Stanley Parness, Edith Miller, JJ), entered July 18, 1989, which affirmed an Order, Civil Court, New York County (Bruce J. Gould, J.) entered May 18, 1988, unanimously affirmed, without costs.

Petitioner, owner of an interim multiple dwelling, commenced non-payment proceedings against loft tenants. The Civil Court dismissed the petitions at the close of petitioner's case for failure to comply with an owner's obligation pursuant to MDL § 284(1)(i). Petitioner appealed and the Appellate Term affirmed on the basis of the majority opinion in *902 Assoc. v. Total Picture Creative Services*, 144 Misc.2d 316, 547 N.Y.S.2d 978 (Ostrau, P.J., dissenting). We agree.

Appendix K

[1,2] Article 7-C of the Multiple Dwelling Law (the "Loft Law") balances the interests of loft tenants and owners. While the statute allows owners to collect rent despite the lack of an appropriate certificate of occupancy, it specifically conditions that relief upon compliance by the owner with the Loft Law (MDL § 285). The statute sets forth such obligations to legalize a covered loft building (MDL § 284). Petitioner contends that a non-payment proceeding may be maintained upon a showing of compliance with the registration requirement (MDL § 284[2]) and a reasonable attempt to comply with the four step legalization procedure of MDL § 284(1)(i). An attempt is insufficient, although we are informed that subsequent to the non-jury trial, additional actions were taken by the petitioner-landlord which could establish compliance, and we do not foreclose a further proceeding to so establish. An owner must prove compliance with legalization requirements in order to maintain a non-payment proceeding (*Lower Manhattan Loft Tenants v. New York City Loft Board*, NYLJ, August 15, 1984, p. 11, col. 1 [Sup.Ct., NY Co.]; *Cobra Resources, Inc. v. Dumpl, Inc.*, 138 Misc.2d 91, 522 N.Y.S.2d 433; *Greeting Card Publishers, Inc. v. Spencer*, 141 Misc.2d 800, 534 N.Y.S.2d 636; *902 Associates Ltd. v. Total Picture Creative Services, Inc., supra.*) Strict adherence is necessary to satisfy the public policy considerations recognized by the Legislature to protect the life, health and safety of tenants and the integrity of zoning regulations. Although the statute also contains provisions for exemption of owners due to financial hardship (MDL § 285[2]), petitioner never made a hardship application.

[3] Nor is a finding of non-compliance by the Loft Board a prerequisite to a determination of non-compliance by a Court of competent jurisdiction. While the Loft Board may

subject an owner to penalties upon such a finding (MDL § 284[1][ii]), the statute does not make such a finding a necessary predicate. Unless the Legislature has expressed an explicit intention to vest exclusive original jurisdiction in the administrative agency, the Court will be held to have concurrent jurisdiction (2 *NY Jur 2d* Administrative Law, §§ 178-80). Finally, the statute sets forth no obligation for tenants to post rent monies with the Court to protect an owner's property interest.

APPENDIX L — NEW YORK TIMES ARTICLE

Copyright (c) 1986 The New York Times Company;
The New York Times

May 25, 1986, Sunday Late City Final Edition

SECTION: Section 8; Page 7, Column 1; Real Estate Desk

LENGTH: 1012 words

HEADLINE: City Drafts Formal Rules for Living in Artists' Lofts

BYLINE: By Michael deCourcy Hinds

BODY:

TO live in one of the 3,500 lofts in NoHo, residents must be artists and they are supposed to prove it to the Department of Cultural Affairs, which recently drafted regulations based on the informal procedure it has used since 1971.

"These are the first formal regulations we have proposed," said Susan B. Rothschild, counsel to the department. "They are basically a codification of existing procedures. Our goal was to encourage anybody in the fine arts to apply."

City and community surveys indicate that a third of the residents in the two sections are certified artists and that the majority of the remaining residents are qualified artists who have not applied for certification.

Most of the nonartist residents, with exceptions based

on the length and location of their residence, are living in SoHo or NoHo illegally. The city has not enforced this zoning provision, but many tenants seek certification to prevent landlords from using their illegal status as grounds for eviction.

SoHo is the area south of Houston Street to Canal Street and bounded by West Broadway on the west and Lafayette Street on the east. NoHo is the area north of Houston Street to Astor Place, from Broadway on the west to the Bowery and Mulberry Street on the east.

Artists and tenants generally welcome the issuance of regulations.

"It's high time for them to codify something," said Chuck DeLaney, a photographer and a tenant representative on the city's Loft Board, which regulates about 7,000 city lofts. "For 15 years, this has been part of the oral tradition. How to become a certified artist is like trying to find out how to get to heaven — you always had to take somebody's word for it."

Certification is required by the city's zoning resolution, which permits artists to live and work in SoHo and NoHo, manufacturing-zoned districts. The State Legislature made this arrangement possible in 1964, when it amended the Multiple Dwelling Law to permit joint living-working quarters for artists in commercial and industrial lofts in locally designated areas.

The state law defines an artist as "a person regularly engaged in the fine arts, such as painting and sculpture, or in the performing or creative arts, including choreography and filmmaking, or in the composition of music on a professional basis and so certified."

Appendix L

Commercial artists, such as illustrators or photographers, were not included, the theory being that they are better able to afford studios in other areas.

The department decided to issue the regulations in an effort to discourage nonartists from illegally moving into the area — and to comply with a ruling in State Supreme Court that ordered the agency to write regulations. The ruling came in a case involving the department's refusal to certify a photographer. The court held that the case was impossible to review in the absence of written certification rules.

The certification procedure calls for artists to provide samples of their work, a resume of their training and exhibitions and professional references.

A major change in the proposed regulations would eliminate the requirement for artists to apply for certification every three years. Instead, artists would be given lifetime certification, which would be updated only when an artist moved from one loft to another. Newcomers must register under the new regulations when they take effect. It has not yet been determined whether the existing three-year certifications will be automatically extended to lifetime certification.

The new certification rules become effective in August after a comment period. They are not intended to be used as a tool to evict nonartists from SoHo or NoHo, but to discourage more nonartists from moving to the area, according to the department.

The city's Planning Commission is currently considering ways to resolve the status of nonartist residents. LAST Wednesday the City Council's Committee on Housing

and Buildings held a hearing on Councilwoman Miriam Friedlander's resolution that the Planning Commission "waive the artist-certification requirement for residents who lived in the area prior to April 1, 1981, or who are otherwise eligible for coverage under the loft law." The loft law, for example, grandfathers the residential status of some nonartists who have lived in the area since 1976.

The Democratic Councilwoman, whose district is lower Manhattan, has also introduced a resolution urging the relevant city agencies to give tenants living in illegal lofts — the commercial buildings used for residences — another chance to register them and be protected from eviction under zoning resolutions. As it stands now, about 200 illegal lofts were not registered before the 1983 deadline and the tenants are subject to eviction, according to the Loft Zoning Coalition, a tenant group. The Loft Board, meanwhile, continues to develop a large backlog of landlord-tenant cases because it was not been able to hold regular meetings for several months this year as a result of vancancies on the board and delays caused by an ethics ruling, according to William Bernstein, executive director of the board.

In April, Jorge Batista, the former board chairman and president of the South Bronx Development Organization, resigned as a result of the city's Board of Ethics ruling that board members are city officials and that their outside business activities were restricted by city laws. Mayor Koch then appointed George Dole as chairman.

APPENDIX M — STANDARD FORM OF LOFT LEASE

STANDARD FORM OF LOFT LEASE
The Real Estate Board of New York, Inc.

Agreement of Lease made as of this 27th day of May 1982, between 640 BROADWAY RENAISSANCE CO. party of the first part, hereinafter referred to as LANDLORD, and PHOEBE RENTSCHLER and TEMPLE SMITH party of the second part, hereinafter referred to as TENANT

Witnesseth: Landlord hereby leases to Tenant and Tenant hereby hires from Landlord Loft Unit 9E in the building known as 640 Broadway in the Borough of Manhattan, City of New York, for the term of TWO (2) YEARS (or until such term shall sooner cease and expire as hereinafter provided) to commence on FIRST day of June nineteen hundred and Eighty-Two, and to end on THIRTY-FIRST day of May nineteen hundred and Eighty-Four both dates inclusive, at an annual rate of TWELVE THOUSAND DOLLARS ($12,000.00), payable in equal monthly installments of $1,000.00 on the first of each and every month without demand,

* * *

The parties hereto, for themselves, their heirs, distributees, executors, administrators, legal representatives, successors and assigns, hereby covenant as follows:

Rent

1. Tenant shall pay the rent as above and as hereinafter provided.

Appendix M

Occupancy

2. Tenant shall use and occupy premises for PHOTOGRAPHY STUDIO and for no other purpose.

Alterations:

3. Tenant shall make no changes in or to the demised premises of any nature without Landlord's prior written consent. Subject to the prior written consent of Landlord, and to the provisions of this article, Tenant at Tenant's expense may make alterations, installations, additions or improvements which are non-structural and which do not affect utility services or plumbing and electrical lines, in or to the interior of the demised premises by using contractors or mechanics first approved by the Landlord.

* * *

Repairs:

4. Tenant shall, throughout the term of the lease, take good care of the demised premises and the fixtures and appurtenances therein and at Tenant's sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements fire or other casualty, excepted. Notwithstanding the foregoing, all damages or injury to the demised premises or to any other part of the business, or to its fixtures equipment and appurtenances, whether requiring structural or non-structural repairs, caused by or resulting from carelessness, omission, neglect or improper conduct of Tenant, Tenant's servants, employees, invitees or licensees, shall be repaired promptly by Tenant at its

sole cost and expense, to the satisfaction of Landlord reasonably exercised.

* * *

Requirements of Law, Fire Insurance, Floor Loads:

6. Prior to the commencement of the lease term, if Tenant is then in possession, and at all times thereafter, Tenant at Tenant's sole cost and expense, shall promptly comply with all present and future laws, orders and regulations of all state, federal, municipal and local governments, departments, commissions and boards and any direction of any public officer pursuant to law and all orders, rules and regulations of the New York Board of Fire Underwriters or any similar body which shall impose any violation, order or duty upon Landlord or Tenant with respect to the demised premises whether or not arising out of Tenant's use or manner of use thereof, or with respect to the building if arising out of Tenant's use or manner of use of the premises or the building (including the use permitted under the lease). Except as provided in Article 29 hereof, nothing herein shall require Tenant to make structural repairs or alterations unless Tenant has by its manner of use of the demised premises or method of operation therein, violated any such laws, ordinances, orders, rules, regulations or requirements with respect thereto.

* * *

Occupancy:

15. Tenant will not at any time use or occupy the demised premises in violation of the certificate of occupancy issued for the building of which the demised premises are a part. Tenant has inspected the premises and accepted them as

is, subject to the riders annexed hereto with respect to Landlord's work, if any. In any event, Landlord makes no representation as to the condition of the premises and Tenant agrees to accept the same subject to violations whether or not of record.

* * *

Sprinklers:

29. Anything elsewhere in this lease to the contrary notwithstanding, if the New York Board of Fire Underwriters or the New York Fire Insurance Exchange or any bureau, department or official of the state or city government require or recommend the installation of a sprinkler system or that any change, modifications, alterations, or additional sprinkler heads or other equipment be made or supplied in an existing sprinkler system by reason of Tenant's business or the location of partitions, trade fixtures, or other contents of the demised premises, or for any other reason, or if any such sprinkler system installations, changes, modifications, alterations, additional sprinkler heads or other such equipment, become necessary to prevent the imposition of a penalty or charge against the full allowance for a sprinkler system in the fire insurance rate set by any said Exchange or by any fire insurance company, Tenant shall, at Tenant's expense promptly make such sprinkler system installations, changes, modifications, alterations, and supply additional sprinkler heads or other equipment as required whether the work involved shall be structural or non-structural in nature.

* * *

Appendix M

Glass:

36. Tenant shall replace, at the expense of Tenant, any and all plate and other glass damaged or broken . . . w

* * *

SEE RIDERS ANNEXED HERETO AND MADE PART HEREOF.

In Witness Whereof, Landlord and Tenant have respectively signed and sealed this lease as of the day and year first above written.

640 BROADWAY RENAISSANCE CO.

Witness for Landlord: By:.....

..... /s/.....
PHOEBE RENTSCHLER

Witness for Tenant: /s/.....
TEMPLE SMITH

..... /s/.....

* * *

ADDITIONAL CLAUSES attached to and forming a part of Lease dated May 27, 1982 between 640 BROADWAY RENAISSANCE CO. as Landlord and PHOEBE RENTSCHLER and TEMPLE SMITH as Tenant.

39. *PERMITS:* Tenant covenants that Tenant will not

use or suffer or permit any person to use the demised premises for any unlawful purpose and to obtain and maintain at Tenant's sole cost and expense all licenses and permits from any and all governmental authorities having jurisdiction of the demised premises which may be necessary for the conduct of Tenant's business therein. Tenant further covenants to comply with applicable laws, resolutions, codes, rules and regulations of any department, bureau, agency or any governmental authority having jurisdiction over the operation, occupancy, maintenance and use of the demised premises for the purposes set forth herein. Tenant will indemnify and save Landlord harmless from and against any claims, penalties, loss, damage or expense imposed by reason of a violation of any applicable law or the rules and regulations of governmental authorities having jurisdiction thereof related to Tenant's use and occupancy.

40. *INDEMNITY:* Tenant agrees to indemnify and save harmless landlord against and from any and all claims by or on behalf of any person or persons, firm or firms, corporation or corporations, arising from any work or thing whatsoever done by or on behalf of Tenant, in or about the demised premises, and will further indemnify and save Landlord harmless against and from any and all claims arising from any breach or default on the part of Tenant in the performance of any covenant or agreement on the part of tenant to be performed, pursuant to the terms of this lease, or arising from any act or negligence of Tenant, or any of its agents, contractors, servants, employees or licensees, and from and against all costs, reasonable counsel fees, expenses and liabilities incurred in or about any such claims or action or proceeding brought thereon; and in case any action or proceeding be brought against Landlord by reason of any such

claim, Tenant, upon notice from Landlord, covenants to resist or defend, at Tenant's expense, such action or proceeding by counsel reasonably satisfactory to Landlord.

* * *

54. COST OF LIVING ADJUSTMENT: Recognizing the length of the term of the lease granted Tenant and inflationary tendencies in recent years, Tenant agrees that in the event the "Consumer Price Index" published by the Bureau of Labor Statistics of the U.S. Department of Labor (1967 = 100) for New York/Northeastern New Jersey area fir :All items" (hereinafter called the "Price Index"), or successor or substitute index appropriately adjusted, reflects an increase after the commencement date of this lease in the cost of living, over and above such costs as reflected by such Price Index as it exists for the month of May 1982 (hereinafter called the "Base Month") the fixed rent payable hereunder shall be increased in accordance with the following:

(a) There shall be no adjustment until the month of June 1983 On the first day of June 1983 and each June 1 thereafter through the term, there shall be an adjustment in the amount of said fixed rent based on the difference between the Price Index as it exists on the Base Month and the Price Index for the calendar month of the date of such adjustment.

(b) The percentage increase thus determined shall be multiplied by annual fixed rent payable hereunder and this sum shall represent the annual increase in such rent for the twelve (12) months next ensuing, commencing with such June adjustment month, provided that no such adjustment shall result in a decrease in the fixed rent below the fixed rent payable by Tenant under the terms of this lease.

Appendix M

* * *

55. *Maintenance.* Tenant shall maintain the premises in a proper manner and in a general state of cleanliness. Tenant shall, at Tenant's sole cost and expense, arrange for the removal of and shall cause to be removed all refuse and rubbish from the demised premises in a manner which shall at all times comply with (a) such rules and regulations as, in the judgment of the Landlord, are necessary or desirable for the proper operation of the Building and (b) all applicable laws, orders, ordinances, rules and regulations of the Sanitation Department and Board of Health of New York City and of any other governmental authority having jurisdiction over the demised premises or the operations conducted therein.

56. *No Representations.* Tenant acknowledges that Tenant is fully familiar with the condition of the Building and the demised premises. Tenant therefore agrees to accept the demised premises "as is" and in whatever state or condition they may be in at the commencement of the term of this lease. Landlord shall not be obligated to do any work or may any repairs, alterations, or improvements in or to the demised premises, except as specifically set forth in this lease.

* * *

58. *Certificate of Occupancy:* Tenant acknowledges that the certificate of occupancy, if any, for the building does not permit residential occupancy of the premises.

* * *

62. Tenant shall supply and install all fixtures desired by Tenant at Tenant's own cost and expense. Tenant also

recognizes and agrees that the Tenant must obtain the written consent of the landlord for all alteration work to be done on the premises *in advance* for all such work being done. Tenant further recognizes and agrees that because this is a fireproof building, that all partition work must be done with metal studs and with 5/8" sheet rock on both sides. Tenant further recognizes, understands and covenants that the use of any wooden studs or partitions in the premises will be both a violation of the lease and a violation of the applicable building laws and codes and tenant covenants and agrees not to use any non-fireproof materials in any such construction work.

63. Tenant also recognizes and understands that all plumbing work must be done or approved by a licensed plumber and will submit all plumbing plans to the landlord for landlord's prior written approval before such work is commenced.

64. Tenant recognizes, agrees and covenants that all waste and vent lines must be made of properly sized cast iron or galvanized iron pipe and that the use of plastic pipe is not legal in New York City. Tenant further recognizes and agrees that if copper tubing is used, said copper tubing must be *rigid* copper tubing and that the use of flexible copper tubing is not lawful or permitted and will also be a violation of the lease.

65. Tenant recognizes, agrees and covenants that all electrical work must be done and filed by a New York City licensed electrician. Tenant shall supply copies of all electrical installation drawings to the Landlord prior to such installation.

66. Tenant shall require all its contractors, plumbers and electricians to supply to the Landlord a certificate of insurance naming the Landlord as an additional insured prior to the commencement of any work by said contractor, plumber or electrician.

Appendix M

* * *

69. Tenant warrants and represents that Tenant has fully inspected premises and, in particular, the present gas and electric services in the premises; Tenant accepts the premises and the existing gas and electric services as is and represents and warrants to the landlord that all necessary work to the electric and gas systems in the loft premises, if any, shall be done by Tenant, at Tenant's sole cost and expense, and in compliance with all applicable New York City codes, laws and regulations. All necessary installation of any meters for gas or electric service, or additional gas or electric lines, if any, will be at Tenant's sole cost and expense.

* * *

72. Tenants agree to accept the demise premises "as-is" in its condition as of the date hereof.

Please Initial:

Landlord _____

Tenant _____

* * *

GUARANTY

The undersigned Guarantor guarantees to Landlord, Landlord's successors and assigns, the full performance and observance of all the agreements to be performed and observed by Tenant in the attached Lease, including the "Rules and Regulations" as therein provided, without requiring any notice to Guarantor of nonpayment or, nonperformance, or proof, or notice of demand, to hold the undersigned responsible under

this guaranty, all of which the undersigned hereby expressly waives and expressly agrees that the legality of this agreement and the agreements of the Guarantor under this agreement shall not be ended, or changed by reason of the claims by Landlord against Tenant of any of the rights or remedies given to Landlord as agreed in the attached Lease. The Guarantor further agrees that this guaranty shall remain and continue in full force and effect as to any renewal, change or extension of the Lease. As a further inducement to Landlord to make the lease, Landlord and Guarantor agree that in any action or proceeding brought by either Landlord or the Guarantor against the other on any matters concerning the Lease or of this guaranty that Landlord and the undersigned shall and do waive trial by jury.

Dated, New York City 5/27 1982

WITNESS:

s/s.....Guarantor
Phoebe Retschler

/s/_____
Temple Smith

APPENDIX N — CERTIFICATION OF THE CLERK OF THE UNITED STATES BANKRUPTCY COURT

UNITED STATES BANKRUPTCY COURT

Southern District of New York

In re

640 BROADWAY RENAISSANCE COMPANY

Case No. 90B10574 TLB

Debtor(s)*
Social Security No.:
Employer Tax ID No.:

CERTIFICATE OF COMMENCEMENT OF CASE

I certify that on 2/22/90

XX the above named debtor filed a petition requesting relief under chapter 11 of the Bankruptcy Code (title 11 of the United States Code), or

__ a petition was filed against the above named debtor under chapter __ of the Bankruptcy Code (title 11 of the United States Code), and

__ that as of the date below the case has not been dismissed.

---

* Set forth all names, including trade names, used by the debtor within the last 6 years. (Bankruptcy Rule 1005). For joint debtors set forth both social security numbers.

Appendix N

CECELIA M. LEWIS
Clerk of Court

By: /s/_____
Deputy Clerk

FEB 22 1990
Date

APPENDIX O — CERTIFICATE OF OCCUPANCY

DEPARTMENT OF BUILDINGS

BOROUGH OF MANHATTAN, THE CITY OF NEW YORK

Date May 17, 1966 No. 63115

CERTIFICATE OF OCCUPANCY

NO CHANGES OF USE OR OCCUPANCY NOT CONSISTENT WITH THIS CERTIFICATE SHALL BE MADE UNLESS FIRST APPROVED BY THE BOROUGH SUPERINTENDENT

This certificate supersedes C. O. No. 30409

THIS CERTIFIES that the altered building premises located at 640 Broadway; 64-66 Bleecker St.; 174 Crosby St. Block 522 Lot 14

That the zoning lot and premises above referred to are situated, bounded and described as follows:

BEGINNING at a point on the east side of Broadway distant 0'-0" feet south from the corner formed by the intersection of Broadway and Bleecker Street running thence east 196'-4" feet; thence south 27'-3" feet; thence west 196'-4"; thence north 25'-3" feet; to the point or place of beginning, conforms substantially to the approved plans and specifications, and to the requirements of the Building Code, the Zoning Resolution and all other laws and ordinances, and of the rules of the Board of Standards and Appeals, applicable to a building of its class and kind at the time the permit was issued; and

Appendix O

CERTIFIES FURTHER that, any provisions of Section 646F of the New York Charter have been complied with as certified by a report of the Fire Commissioner to the Borough Superintendent. Class 1. Alt. No. 2134-1965. Construction classification - Fireproof. Occupancy classification - Commercial Building. Height 9 stories, 122 feet. Date of completion - April 29, 1966. Located in M 1-5 Zoning District at time of issuance of permit.

This certificate is issued subject to the limitations hereinafter specified and to the following resolutions of the Board of Standards and Appeals: and The City Planning Commission.

PERMISSIBLE USE AND OCCUPANCY

Off-Street Parking Spaces _____

Off-Street Loading Berths _____

STORY	LIVE LOADS Lbs. per Sq. Ft.	PERSONS ACCOM-MODATED	USE
Sub-cellar			Boiler and vacant.
Cellar	150	2	Electric shop and storage.
1st Story	150	25	Stores and barber.
2nd Story	150	10	Manufacturing and cutting.
3rd Story	150	20	Offices.
4th Story	150	8	Manufacturing and cutting.

Appendix O

5th Story	150	15	Offices.
6th Story	150	25	Manufacturing.
7th Story	150	40	Manufacturing and cutting.
8th Story	150	8	Manufacturing and cutting.
9th Story	150	5	Manufacturing and cutting.
		NOTE:	All manufacturing is in use group 17.
			FIRE DEPARTMENT APPROVALS: Standpipe System-April 25, 1944. Interior Fire Alarm System - April 25, 1944. Thermostatic Fire Heat System - March 11, 1966.

OFFICE COPY - DEPARTMENT OF BUILDINGS

/s/_____
Borough Superintendent

APPENDIX P — LOFT BOARD ORDER

NEW YORK CITY
LOFT BOARD

----------x Loft Board Order

In the Matter of the	:	# 759
Applications of Joel D.	:	MC # 0429
Hinman and Marilyn Manos	:	Re: 640 Broadway New York, New York
----------x		Docket #'s TR-0092, TR-0365

The case concerns two applications filed by the tenants of 640 Broadway, New York, New York. In application No. TR-0092, filed on August 6, 1983, Mr. Joel D. Hinman and some 23 other tenants signed a coverage application form. In application No. TR-0365, Marilyn Manos, a subtenant of the western half of unit 8E, filed an application alleging that she was the residential occupant entitled to protection. These applications were later supplemented by a letter dated February 26, 1985, contending that the following units and residential occupants were covered by Article 7-C:

2E	-	John Eisner
2W	-	Robert Rossiter
2WB	-	Loren Calaway
3E	-	Richard Yoder
3W	-	Charles Searles
4E	-	Rafael Barrios, Carlos Sosa, and Judy Levy
4WF	-	Guillermo Gleizer
4WR	-	Juliet Holland
5E	-	Joel Hinman

Appendix P

5W	-	Andrea Vignoli
6E	-	Hannah Eshel
6W	-	Kenneth De Lap
6WR	-	Lisa Krall
7E	-	Nancy Hoffman Giesman
7W	-	Ruth Holloman
7C	-	Kim Steele
8E	-	Rina Peleg and Marilyn Manos
8W	-	Donna Goodman
8C	-	Peter Neptune
9E	-	Temple Smith and Phoebe Rentschler
9W	-	Marie-Paule Fauque

The premises are in a section of the city known as NoHo, in an area zoned as Ml-SB. This nine-story building itself was erected around 1965 and occupies approximately 5000 square feet. The Certificate of Occupancy ("C of O"), issued on May 17, 1966, permits commercial use of the cellar and first floors, office use of the third and fifth floors, and manufacturing use of the second, fourth, sixth, seventh, eighth, and ninth floors. Under the Zoning Resolution, residential use in a building of this size located on Broadway is permitted only for joint living-work quarters for artists by a way of a special permit. Zoning Resolution Section 42-14B(l)(b). The special permit requirements are significantly simplified where the city Planning Commission determines that floor area in the building was occupied as dwelling units or joint living-work quarters for artists on September 1, 1980. Zoning Resolution Section 74-782. As of January 8, 1987, the definition of "joint living-work quarters for artists" was expanded to include units occupied by nonartists who file with the Department of Cultural Affairs by October 8, 1987. Zoning

Appendix P

Resolution Section 12-10 (amended effective January 8, 1987).*

PROCEEDINGS BEFORE THE BOARD

This case was initially conferenced on December 12, 1983, with some 16 tenants, their attorney Deirdre Carson, Esq., and the owner's attorney, Margaret Baisley, Esq., present. Soon afterwards, Gulliermo Gleizer, one of the tenants not present at the conference, filed a separate application with the Board and an Article 78 petition in the New York Supreme Court seeking to nullify the entire proceedings due to the failure to name him as an affected party in the application. His application before the Board was denied, Loft Board Order No. 0102, and the Article 78 proceeding dismissed. *Gleizer v. New York City Loft Board*, Order at 3 (New York Co. Supreme Court, June 16, 1984). On reconsideration, the Board further held that any potential prejudice to Mr. Gleizer was remedied by allowing him to file an answer to the original application. Loft Board Order No. (August 1, 1984). The history of the proceeding involving Mr. Gleizer is described in greater detail in that order.

The case was conferenced a second time before a new hearing officer on January 25, 1985. This conference was attended by 20 tenants (including Mr. Gleizer), Ms. Carson, and Richard A. Givens, Esq., the owner's new attorney. After this conference, the owner filed an answer on March 2, 1985, alleging, *inter alia*, that the applicants must show primary residential use of each window period occupant, that zoning

---

* According to the City Planning Commission, residency applications and/or nonartist filings are presently pending for all the units in the coverage application.

restrictions precluded coverage, that coverage would constitute an unconstitutional impairment of contracts and a taking of property without due process, that no public emergency existed to bring Article 7-C into operation, that a hardship claim be entertained without a formal application being required, and that the Loft Board is not an impartial tribunal.

THE HEARINGS

The hearings in this case were held between March 25, 1985, and September 16, 1986, for a total of 25 days. The tenants called 27 witnesses and submitted over 250 exhibits. The owner produced no witnesses, but relied instead on several post-hearing submissions to press its legal and constitutional objections to coverage. In addition to presenting evidence upon the issue of whether individual units were residentially occupied during the window period, the tenants adduced additional testimony going to the owner's attempts to seek a zoning variance from the Department of Buildings in 1978 and a special permit from the Department of City Planning to permit residential conversion of the premises in 1982. This evidence, which the tenants' attorney represented as admissions on the part of the owner that the building was residentially occupied at least since 1978, will be discussed first.

Owner's Attempts to Convert Building to Legal Residential Use

The records of the Department of Buildings indicate that in May 1977 and November 1978 violations were issued against the owners of 640 Broadway for illegal use of the building for residential purposes. The evidence relating to the owner's subsequent attempts to obtain permission for

residential conversion of the premises consisted principally of the testimony of *Joseph Lombardi*, the owner's architect. Mr. Lombardi testified that he was retained by Martin Fine (an employee of the owner 640 Broadway Renaissance Co., who purchased the building in 1978) in early 1978 to file an alteration application with the Department of Buildings to permit residential conversion of floors two through nine of 640 Broadway. After the alteration application was filed in the spring of 1978, Mr. Lombardi filed an application for a zoning variance with the Board of Standards and Appeals on April 21, 1980, to permit the residential conversion. In support of this application, Mr. Lombardi and the owner submitted a tenant history listing the tenants in occupancy since 1978* and describing their use as "artist's studio," a permissible use under the zoning law. At the same time, Lombardi submitted several letters from real estate brokers who stated that they were unable, despite extensive advertising, to find any conforming-use tenants for the premises.

After the Zoning Resolution was amended in 1981, Mr. Lombardi withdrew the variance application and, around June 1982, filed a new special permit application with City Planning pursuant to Zoning Resolution Section 74-782.** Mr. Lombardi's attached statement remarked,

---

* The tenants listed were Rossiter (2W), Goda and Moriya (2E), Eisner (2E), Searles (3W), Yoder (3E), Barr & Winfield (4W), Gleizer (4W), Carlos Sosa (4E), Hinman & Murphy (5W), Vignoli & Gragnani (5E), Krall & Palazzollo (6W), Holloman (7W), Kida (7E), Rudman (7E), Giesmann (7E), Rexach (8W), Goodman (8W), Ohana (8E), Fauque & Bertoglio (9W), and DiGiovanni (9E).

** According to the City Planning Commission, the owner sought to withdraw this special permit application in July 1985.

Appendix P

> For three and one half (3 1/2) years after [the winter of 1976] an extensive and costly campaign was waged in an attempt to find conforming-use tenants. *This campaign resulted in a complete failure.* [Emphasis added.]

Soon afterwards, Mr. Lombardi solicited documentation from the tenants to establish their residential occupancy as of September 1, 1980, and supplied these documents in an application dated June 21, 1983, indicating that the first floor was a "residential lobby" and that the second through ninth floors were occupied as "dwelling units/joint living-work quarters for artists."*

Doris Diether, a member of Manhattan Community Board No. 2, testified concerning the zoning variance. She stated that, in May 1980, the owner's application for a variance came before the community board. During the hearings, some of the tenants appeared and indicated they were already living in the building. Twelve tenants** also signed a collective statement stating they were residing in the building. *See* Exhibit 23.

---

* The special permit application indicated occupancy by Tanabe (2E), Rossiter (2W), Calaway (2WB), Yoder (3E), Searles (3W), Sosa (4E), Gleizer (4W), Vignoli (5E), Hinman & Murphy (5W), Palazzolo (6W), Krall (6W), Eshel (6E), Hoffman (7E), Holloman & Steele (7W), Peleg (8E), Goodman (8W), and Fauque (9W).

** The twelve tenants signing the statement were Beth Zaboth (2E), Charles Searles (3W), Charles Gifford (4W), Joel Hinman (5W), Philip Murphy (5W), Hannah Eshel (6E), Rachel Rudman (7E), Kim Steele (7W), Ruth Holloman (7W), Debra Winters (9E), Marie-Paule Fauque (9W), and Edo Bertoglio (9W).

Appendix P

On June 19, 1980, the community board adopted a resolution recommending that the zoning variance application be denied. As part of the resolution, the board stated:

> This building was illegally occupied even when the owner purchased it, and the owner was aware of this fact yet did nothing about it, thus encouraging other tenants to move in, and discouraging conforming uses.

See Exhibit 20.

Following this, several hearings were held before the Board of Standards and Appeals. During these hearings, Mr. Lombardi submitted new floor plans to BSA, which allegedly more accurately reflected the existing unit layouts. After this submission and prior to a February 19, 1981, BSA hearing, Ms. Diether, along with Mr. Lombardi, conducted an inspection of all the units in the building to which she was able to gain access, making notations as she went. Notations on a copy of the Lombardi floor plans are made for units 2W, 2WB, 3E, 4R, 4WB, 4E, 5W, 5E, 6W, 6WB, 6E, 7W, 7WB, 8W, and 8E. Commenting generally upon her findings in a zoning committee report, dated February 19, 1981, Ms. Diether stated:

> The conditions I encountered on the inspection were very upsetting. The tenants or at least many of them have spent considerable sums to renovate spaces in the building. Loft beds have been installed, complete kitchens and baths, fancy floors, partitions, a lot of built-in cabinets, etc. However, a good portion of the work would never pass an inspection by the Department of Buildings ... It appears to me that, in order to assure that all the units will be legal, the building should be done over almost

completely, even though this will be a real hardship on the tenants.

Ms. Diether testified that in September 1981, BSA asked that the 640 Broadway variance application, along with similarly situated buildings, be withdrawn and referred to the City Planning Commission for a special permit pursuant to Zoning Resolution Section 74-782.

* * *

POST-HEARING MEMORANDA

Subsequent to the last hearing date of September 16, 1985, several memoranda of law were filed by Richard Givens, Esq., on behalf of the owner; by Deirdre Carson, Esq, on behalf of all tenants except Guillermo Gleizer; and by Guillermo Gleizer, *pro se*.

Mr. Givens filed his "First Written Offer of Proof" on November 6, 1985. By this memorandum, the owner sought to adduce evidence on (1) the lack of a public emergency requiring implementation of Article 7-C; (2) Article 7-C's undue burden on interstate commerce; (3) the inadequacy of artist certification as a basis for compulsory residential conversion; (4) the financial hardship of compliance with Article 7-C on the owner; and (5) the impropriety of the Loft Board as an adjudicative body. The owner also raised the following defenses to coverage: (1) that the failure of some tenants to file New York City income taxes or to list 640 Broadway as their residence on their federal income taxes requires denial of coverage; (2) that the tenants are estopped from seeking coverage by their signing leases prohibiting residential use; (3) that coverage would impose involuntary

servitude upon the owner; (4) that to require a special permit to be sought would violate due process; (5) that a compulsory zoning change would violate due process and be unconstitutional as applied; and (6) that coverage would deny the owner equal protection by treating it worse than owners who were granted special permits or than public utilities which are permitted a 14% return on investment.

On November 13, 1985, the hearing officer indicated that she would recommend denial of the owner's first offer in its entirety. She concluded (1) that the Board lacked jurisdiction to consider the constitutional issues; (2) that evidence on a public emergency and on the legality of the artist certification requirement was not relevant to coverage; (3) that the owner's failure to timely file a hardship application as required by the Board's regulations precluded consideration of any hardship claims; and (4) that the Board lacked jurisdiction to adjudicate the equitable defense of estoppel.

The owner filed a "Second Written Offer" a few months later, on January 27, 1986. This memorandum requested findings as to whether certain facts, nearly all of which had occurred on the record during the hearings, had actually taken place. On February 14, 1986, the hearing officer also denied the owner's second offer in its entirety on the grounds that such preliminary findings were improper. The owner's "Third Written Offer of Proof" was filed on May 5, 1986, contending that transcription of the hearings would cost $15,000 and require three months to prepare and that therefore the second offer should be accepted. The hearing officer denied the third offer on May 9, 1986.

Appendix P

Guillermo Gleizer filed three *pro se* post-hearing memoranda. The first, filed on May 6, 1986, contended that (1) he was the prime lessee of unit 4W and 4WR, (2) 4WR was unoccupied until May 1, 1980, and Mr. Gleizer occupied 4WR as a warehouse and projected photography studio until June 1, 1980; (3) Charles Gifford occupied 4WR as an architectural studio; (4) Juliet Holland was not the residential occupant of 4WR because she filed her taxes with a Connecticut address and had her bank, stockbroker, accountant, and doctor in Connecticut; (5) Mr. Gleizer has the right to reclaim 4WR under Subletting Regulations Section B.4; (6) Article 7-C is an unconstitutional impairment of the obligation of contracts; and (7) the Board's subletting regulations are a nullity, having been promulgated without authority.

Mr. Gleizer filed a second brief on May 5, 1987, containing similar contentions: (1) that Mr. Gifford did not residentially occupy unit 4WR; (2) that Ms. Holland was not the residential occupant qualified for protection because she offered inadequate proofs of residential occupancy; (3) that Ms. Holland's residential occupancy was precluded by her sublease; and (4) that Mr. Gleizer's pending holdover action against Ms. Holland, filed on September 1, 1984, permitted him to reclaim 4WR under Subletting Regulation Section B.4. In this brief, Mr. Gleizer also contended, apparently for the first time, that 4WR was a covered IMD unit, having been residentially occupied by Mr. Gleizer from March 1980 to mid-1982. Mr. Gleizer enclosed with this brief his 1980-1981 Con Edison bills, his 1980-1981 telephone bills, his driver's license (expiring in 1984), and a 1984 insurance card.

In July 1987, Ms. Susan Kornhauser, the hearing

officer who presided over the hearings, left the employ of the Loft Board and the case was reassigned to hearing officer John Spooner.

On November 20, 1987, the tenants' attorney, Deirdre Carson, Esq., filed her voluminous brief, consisting of 171 pages of text and 50 additional pages of indices of the hearing tapes and exhibits. This brief contended that all of the units upon which evidence was offered, with the exception of 4WF occupied by Mr. Gleizer, were covered IMD units. In addition, the tenants contended that (1) any units first residentially occupied before April 1, 1981, were accreted units under Coverage Regulations Section I(6)(1)(c); (2) the owner's application for a zoning variance constituted an admission of residential occupancy; (3) coverage may be granted contingent upon ultimate approval of a special permit by City Planning; (4) the Board should find that all of the floor area of the building, from the second through the ninth floors, was residentially occupied on September 1, 1980; (5) implementation of the 1987 amendment to Article 7-C (M.D.L. Section 281(4)) requires a finding of residential occupancy as of September 1, 1980, for units 9E, 2E, 8W, and 7E; (6) the present occupants of the units should be found to be protected under Article 7-C; (7) the question of whether certain units meet the minimum size requirements of the zoning resolution does not preclude coverage but is a matter to be resolved in legalization; and (8) the 1987 amendments to the joint living-work quarters for artists regulations renders moot the owner's objections as to the artist certification process.

The owner responded to the tenants' contentions on December 23, 1987. In its memorandum, the owner contended that the tenants had failed to establish residential occupancy of

the premises because (1) their testimony of residential use contradicted the terms of their leases, which created a presumption of commercial use; (2) the tenants of units 4E, 4WR, 5E, 8E, and 9W had failed to file New York City income tax returns; and (3) the utility bills are hearsay and inadequate indicia of residential use. The owner further contended that (1) undersized units cannot be covered; (2) zoning and statutory amendments cannot be applied retroactively; and (3) the new hearing officer to whom the case was reassigned was unable to observe the witnesses' demeanor and therefore unqualified to recommend findings on the case. Finally, the owner requested a copy of any report submitted by the hearing officer to the Loft Board.

On January 7, 1988, Mr. Gleizer filed his third brief in response to that filed by the owner. In this brief, Mr. Gleizer argued that (1) he has not physically left the premises as the owner alleges; (2) the owner's $1.5 million lawsuit against the 640 Broadway tenants for falsely representing they planned to use their units commercially is inconsistent with their present allegations of non-residential use; (3) Mr. Gleizer is a residential occupant qualified for protection; (4) if 4WR is an IMD unit, Mr. Gleizer is also the protected occupant; (5) Mr. Gleizer received inadequate notice of the hearings and was deprived of an opportunity to cross-examine most of the other tenants.

OPINION:

This case, by its sheer size alone, has been one of the most burdensome the Loft Board has been called upon to adjudicate. The number of allegedly residential units, the imposing array of witnesses, and the daunting volume of

documents will preserve the case in the annals (as well as the file cabinets) of the Board for years to come. Indeed, the original coverage application, filed soon after the creation of the Loft Board, has been with the Board longer than most of the present members or staff. And yet, despite what the owner's vigorous opposition papers would suggest, the issues in the case itself are surprisingly straightforward, both factually and legally.

Perhaps the most complicated issue raised by this case, once the stacks of documents and weeks of testimony have been sorted through, is the status of the alleged residential occupancy under the Zoning Resolution. Article 7-C can cover only those buildings in which the Zoning Resolution permits "residential use as of right." M.D.L. Section 281(2). In a building of this size located on Broadway, the Zoning Resolution permits residential use only under a special permit granted for joint living-work quarters for artists, Zoning Resolution Section 42-14B((1)(b), with the requirements being significantly simplified where the City Planning Commission determines that floor area in the building was occupied as dwelling units or joint living-work quarters for artists on September 1, 1980. Zoning Resolution Section 74-782. In addition, to satisfy the "artist" requirement, occupants must either be certified as artists by the Department of Cultural Affairs or have filed an application with Cultural Affairs by October 8, 1987, alleging residency as of September 15, 1986. Zoning Resolution Section 12-10 (amended effective January 8, 1987).

According to the City Planning Commission files, a special permit and artist/non-artist certifications were timely filed and remain pending for all of the units included in this

coverage proceeding.* Although the owner insists that the absence of a granted special permit automatically precludes coverage, this is inaccurate. Under M.D.L. Section 281(2)(iv), "interim multiple dwellings" include "buildings, structures, or portions thereof which may be converted to residential use pursuant to a special permit granted by a local planning agency." Moreover, the Board regulations include as IMD units those units "in which the residential use may become a use as of right as a result of approval of a grandfathering application, in accordance with Section 281(i) or (iv)." Coverage Regulations Section I(b)(1)(a). Artist certification, too, is excluded as a requirement for coverage, and can lead to an exemption only where the current occupant lacks the necessary certification "at the time of issuance of the final certificate of occupancy." Coverage Regulations Section I(E)(3).

Thus, as past Board decisions have made clear, the Board may adjudicate coverage as long as residential use as-of-right may be granted under the special permit process of Zoning Resolution Section 74-782, whether or not the residential use has presently been approved or not. *See In the Matter of the Application of Vita Holdings Ltd.*, Loft Board Order No. 176 (March 6, 1985); *In the Matter of the Application of 475 Broadway*, Loft Board Order No. 169 (February 6, 1985) (premises covered with continued coverage dependent the granting of a special permit by City Planning); *In*

---

* Applicants' attorney has requested that the Board make a special certification of residential occupancy as of September 1, 1980, for the benefit of the City Planning Commission's consideration of the pending special permit. This the Board declines to do, since it would appear to usurp the fact-finding authority of that agency and is unnecessary to a determination of coverage.

the Matter of the Application of 473 Broadway, Loft Board Order No. 171 (February 6, 1985) (same); *In the Matter of the Application of Max Landau*, Loft Board Order No. 108 (August 1, 1984) (same); *In the Matter of the Application of Morrie Golick*, Loft Board Order No. 72 (March 21, 1984). *See also Missry v. New York City Loft Board*, December 16, 1987, NYLJ, p. 12, col 6., p. 12, col 1 (New York Supreme Court). (Loft Board may require owner to procure City Planning ruling on residential use prior to seeking decoverage.) The pending special permit and artist/non-artist certification are thus sufficient to permit coverage of all of the affected units, with continued coverage dependent upon the subsequent granting of a special permit and the necessary certifications.

The minimum floor coverage issue raised by the owner also does not prohibit coverage under Article 7-C. It is true that M.D.L. Section 277(7)(a)(i) requires that joint living-work quarters for artists contain 1200 square feet of interior space, while Zoning Resolution Section 15-026 (enacted September 25, 1986) permits joint living-work quarters for artists to contain 415 or 600 square feet if certain requirements are met. However, as the Board has held in past decisions, the issue of a unit's size is a question to be addressed in legalization and does not preclude coverage under Article 7-C. *In the Matter of the Application of William Barvin*, Loft Board Order No. 642 (September 11, 1987). Thus, even assuming some of the units are less than the required minimum size, this fact would not affect the coverage question at issue here.

The owner also argues that none of the Zoning Resolution provisions can be applied "retroactively" so as to permit coverage. There is clearly no retroactivity issue as to minimum size, since that is irrelevant to coverage no matter

what version of the resolutions is used. There is likewise no retroactivity issue as to the artist/non-artist certifications, as amended by Zoning Resolution Section 12-10 (January 8, 1987). As already discussed, the Board's own regulations, as well as prior decisions, make clear that the absence of certification does not prevent coverage, even though a lack of certification may result in decoverage if it continues until the issuance of the final C of O. *See* Coverage Regulations Section I(E)(3); *In the Matter of the Application of Milne*, Loft Board Order No. 114 (August 29, 1984).

Thus the sole retroactive application that could possibly affect the coverage determination itself is that of the 1987 amendment to Article 7-C, M.D.L. Section 281(4), which might permit coverage even though certain requirements of the applicable zoning law were not met. However, in light of the compliance with the Zoning Resolution, it is thus unnecessary to address the tenants' arguments as to the applicability of the this amendment to Article 7-C.

In opposition to the implementation of Article 7-C to this particular building, the owner has raised a host of constitutional objections, including arguments that application of the statute would constitute an undue burden on state commerce, involuntary servitude, denial of due process, and denial of equal protection. In addition, the owner raised the equitable defense of estoppel. The constitutionality of Article 7-C has already withstood most of the attacks now raised by the owner. *See Spring Realty Co. v. New York City Loft Board*, 69 N.Y.2d 657 (1987), *cert. denied*, __ U.S. __ (1987). In any case, as the hearing officer properly held, these constitutional and equitable issues cannot be adjudicated by the Loft Board since they lie outside its limited jurisdiction to

implement and enforce Article 7-C. For that reason, all of the owner's constitutional and equitable objections and defenses must be dismissed.

Behind the bluster of the owner's voluminous constitutional and procedural challenges to coverage lies the indisputable fact that the owner's conduct and statements, from 1978 when it purchased the building until at least 1982, expressly recognized the residential use of the upper eight floors. During this time, according to the credible and unrebutted testimony of nearly all the tenants, the owner was leasing the space for "lofts" and even had some tenants (specifically Ms. Eshel) fill out application forms asking about roommates and pets, hardly items of concern for commercial tenancy. At the same time the owner's employees were personally assuring tenants that it was not only acceptable but preferable for them to live in the building, going so far as to approve floor plans for kitchens and bathrooms, recommend electricians and plumbers, and help procure homeowner's insurance.

Along with this conduct, the owner retained an architect in 1978 to commence a series of proceedings with the Department of Buildings, the Board of Standards and Appeals, and finally the City Planning Commission to legalize the building for residential use. In 1982, the owner stated in an application to City Planning that, since 1976, it had completely failed to find conforming use tenants, an admission that the present occupants were non-conforming and, presumably, residential. In support of this same application, the owner supplied documentary proofs solicited directly from the tenants, that most of the building was occupied residentially as of September 1, 1980. Given these clear acknowledgments of

the residential use of the building from 1978 continuing throughout 1980 and 1981, it is difficult, indeed, to see how the owner can now contest the tenants' coverage application on the grounds of inadequate proofs. In truth, the past statements of the owner are the strongest evidence possible of residential occupancy.

Turning to the actual evidence of residential occupancy with this in mind, it becomes clear that the proofs of most of the units, buttressed as they are both by the admissions of the owner, and adequate documentation,* are more than sufficient to establish residential occupancy for the entire window period. Thus, the credible testimony concerning units 2W, 2WB, 3W, 4E, 5W, 5E, 6E, 6WB, 6WF, 7E, 7W, 7C, 8W, and 9W establishes that these units were residentially occupied from April 1, 1980, until December 1, 1981. Two other units, 2E and 8E, which, according to the proofs and credible testimony offered, were occupied residentially before April 1, 1981, through December 1, 1981, constitute accreted units and are also found to be covered by Article 7-C pursuant to M.D.L. Section 281(3).

Three units, 3E, 8C and 9E, present a slightly closer question. Not only did the window period occupants of these units fail to testify at the hearings, but little or no documentary evidence was presented to buttress the other tenants' testimony concerning 1980-1981 residential use. Even though seven tenants and Ms. Diether all testified that they visited Richard

---

* The owner's attacks upon the documentation as either inadequate (in the case of certain tenants who failed to produce tax returns) or hearsay (in the case of utility records) are less than convincing. In any event, except as discussed above, any deficiencies in documentation have been remedied by the credible testimony of the tenants themselves.

Yoder in unit 3E at various times between 1978 and 1985 and knew he resided there with his family, up until the time of the hearing, Mr. Yoder did not testify nor were any documents presented to support a claim of residential use. Likewise, the evidence of the residential occupancy of 8C by Luis Cavello, the alleged building superintendent, consisted solely of the testimony of ten tenants who visited him at various times in 1980, 1981, and 1982. And similarly, although four tenants recalled visiting unit 9E in 1980 when Michael Giovanni lived there, neither Mr. Giovanni's testimony nor any documentary proofs were offered to support this claim. Nevertheless, it is found that the tenants' testimony, which is found to be credible, when considered in light of the owner's admissions of the residential use of the entire building for this period, is sufficient to establish that these three units were residentially occupied for the entire window period, in the case of 3E, or as accreted units from April 1, 1981, until December 1, 1981, in the case of 8C and 9E, and are therefore also found to be covered.

Finally, as to units 4WF and 4WR, an analysis of the conflicting testimony makes it apparent that only unit 4WR can be covered. Three tenants testified that 4W was initially lived in by Allen Barr, who vacated in March 1980. According to the testimony of Mr. Gleizer, he then residentially occupied 4WF from May 1980 up until May 1981, when he sublet the space from May 1981 until May 1982 to Bruce Jope, who Mr. Gleizer testified used the space as an office while he continued to live in Wilmington, Massachusetts. Even though Mr. Gleizer indicated that Mr. Jope might have stayed in 4WF occasionally for two or three days at a time, he stated that the residence of Mr. Jope continued to be Massachusetts. Although other aspects of Mr. Gleizer's testimony with regard to the rear unit

are found not to be credible, as discussed below, his testimony as to the window period occupancy of 4WF, is found to be credible and, since this was the sole evidence adduced on this factual issue during the hearings, unit 4WF is found *not* to have been residentially occupied during the window period and the coverage application as to this unit must be denied.

As to 4WR, Mr. Gleizer testified that he sublet this unit to Charles Gifford from May 1980 until March 1982. Mr. Gleizer denied that Mr. Gifford lived in 4WR. However, in light of Mr. Gifford's testimony as well as that of one other tenant, Mr. Gleizer's denials of residential use are found not to be credible. Instead, based upon the credible testimony of Mr. Gifford and Mr. Hinman, unit 4WR is found to have been residentially occupied throughout the window period and therefore must also held to be covered.

There exists one further issue concerning 4WR which requires adjudication. At the hearing and in his post-hearing submissions, Mr. Gleizer insists that he, rather than Juliet Holland, the tenant since June 1, 1982, is the residential occupant entitled to protection. Ms. Holland denies that Mr. Gleizer has any rights to the unit, credibly testifying that she has lived in the unit since approximately June 1, 1982.* Under the Board's subletting regulations, where the present residential occupant took possession prior to June 21, 1982, as Ms. Holland did, she is the occupant qualified for Article 7-C protection. Subletting Regulations Section B(1) and (2). Thus,

---

* Although Mr. Gleizer argues that Ms. Holland resided in Connecticut not New York, he has raised at most, an issue of primary residence which is not relevant to a coverage proceeding. *See Bor Realty Corp. v. New York City Loft Board*, __ N.Y. 2d __ (September 8, 1987).

Juliet Holland and not Mr. Gleizer must be found to be the protected occupant of unit 4WR.*

Turning finally to the owner's and Mr. Gleizer's procedural arguments as to improprieties in the procedures followed in resolving the case, none of the contentions made, even if true, rise to the level of due process violations. The owner argues that the new hearing officer, assigned to this case in July 1987 upon the departure of the hearing officer who presided over the 1985 hearings, is unqualified to make recommended credibility findings. However, it is well-settled that the constitutional right to due process and a fair hearing "does not require that the actual taking of evidence be before the same officer who makes the final determination." *Rothkoff v. Ratner*, 104 Misc. 2d 204, 206, 428 N.Y.S. 2d 138, 140 (N.Y. Co. S. St., 1980). The only essential requirement is that the officer who makes the decision review all of the evidence. *Id.* Mr. Spooner, the hearing officer who prepared the proposed opinion and order in this case upon Ms. Kornhauser's departure from the office, reviewed the entire case file, including documents and tapes of hearing testimony, and conferred with Ms. Kornhauser. He is thus capable of making the final credibility and legal determinations necessary for resolution of the case.**

---

* Although the applicants seek an adjudication of the protected occupant status for each applicant, this is an issue which the Board has indicated will be adjudicated only when necessary and not as an attendant ruling of every coverage case. *See In the Matter of the Application of William Muschel*, Loft Board Order No. 33 at pp. 12-13 (November 23, 1983). Moreover, since all of the protected occupant disputes, with the exception of 4W, have been withdrawn, universal protected occupant determinations seem unnecessary.

** The owner's request for a copy of the hearing officer's recommended

(Footnote continued)

Appendix P

Mr. Gleizer argues that he was denied due process by the lack of notice of the hearings and was therefore unable to cross-examine some witnesses at all and unprepared to cross-examine Mr. Gifford. First of all, Mr. Gleizer was present at the conference when the original hearing dates were set. It was apparent at that time that, because of the large number of parties and attorneys concerned, the hearing officer could not possibly send out written notices each time a new hearing date was set or adjourned and reset. Rather, it was the parties' obligation to keep informed of the entire hearing schedule. As to the supposed "other witnesses" Mr. Gleizer was unable to cross-examine, Mr. Gleizer made no attempt to recall any of tenants who had already testified or, indeed, to call any witnesses whatsoever to support his claims as to 4WF and 4WR. It is thus Mr. Gleizer's failure to even attempt to call any witnesses, rather than any failure of notice of other hearing dates, which is responsible for the absence of evidence as to his unit. In any case, Mr. Gleizer was clearly informed of the days testimony was taken on 4WF and 4WR, since he was present on all of these days. Having been present on these days, he cannot now complain about deficiency of notice.

Mr. Gleizer's insistence that he was denied a fair opportunity to cross-examine Mr. Gifford is also meritless. The truth is that Mr. Gleizer conducted a lengthy and thorough cross-examination of Mr. Gifford concerning most of the topics testified to on direct. Only once did he make specific reference to a document which he needed to conduct his cross-

---

findings must also be denied since these findings are internal agency communications, preliminary to the actual resolution of the case. Both parties will receive copies of the final order, which is all the Board's procedural regulations require.

examination, and this was supplied by Ms. Carson. The record thus belies his claim that he was somehow "unprepared." As to Mr. Gleizer's contention that he intended to retain an attorney to cross-examine Mr. Gifford at some future time, it need only be pointed out that Mr. Gleizer had several years to retain an attorney and thereby waived any right to complain about lack of legal representation.

Thus, because 640 Broadway meets the statutory criteria of an "interim multiple dwelling," in that at least three units were residentially occupied during the window period, it is found to be covered by Article 7-C, with units as described above.

ORDER:

It is hereby ordered that Docket No. TR-0092 is granted to the extent that 640 Broadway is determined to be an interim multiple dwelling consisting of 20 units: 2E, 2W, 2WB, 3E, 4E, 4WR, 5E, 5W, 6E, 6W, 6WR, 7E, 7W, 7C, 8E, 8W, 8C, 9E, and--. The owner is ordered to register the premises as an IMD with the Loft Board accordingly. Continued coverage of the premises is contingent upon the granting of a special permit by the Planning Commission.

It is further ordered that Docket No. TR-0092 is denied as to unit 4WF.

It is further ordered that Juliet Holland is protected occupant of Unit 4WR.

It is further ordered that Docket No. TR-0365 is hereby dismissed with prejudice.

Appendix P

DATED: April 28, 1988

Date Loft Board Order Mailed: May 10, 1988

/s/

Members Concurring: Chairman Dole; Cooke; DeLaney; Navare, Nemaizer (5)

Members Dissenting: Liebman (1)

Members Absent: Iacobazzo; Martinez (2)

NOTICE

A party aggrieved by a determination of the Loft Board may file an application for reconsideration of a determination within thirty (30) days of service of the determination on the parties (i.e., said application must be received at the Board offices within 30 days of the date the Order was mailed as indicated above). The Board, may in its discretion, reconsider such determination.

Filing of an application for reconsideration shall not toll the statute of limitations for purposes of initiating an Article 78 proceeding.

Supreme Court, U.S.
FILED
MAR 18 1996
CLERK

No. 95-959

In The

Supreme Court of the United States

October Term, 1995

640 BROADWAY RENAISSANCE CO.,

Petitioner,

vs.

JOHN EISNER, *et al.* and 15 Other Cases Consolidated for Purposes of a Joint Appeal,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department

RESPONDENTS' BRIEF IN OPPOSITION

DAVID RATNER
Counsel of Record
HARTMAN, ULE, ROSE
& RATNER
Attorneys for Respondents
305 Broadway, Suite 1201
New York, New York 10007
(212) 437-9110

8497
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction to grant a writ of certiorari in this case where petitioner raised no federal question of any kind in the state court proceedings.

2. Whether the Court ought to grant a writ of certiorari in light of the fact that all of the constitutional issues raised in the petition were decided against petitioner in a previous federal court action entitled *640 Broadway Renaissance Co. v. Cuomo*, 740 F. Supp. 1023 (S.D.N.Y. 1990), *aff'd*, 927 F.2d 593 (1991), *cert. denied*, 500 U.S. 933, 111 S. Ct. 2054, 114 L. Ed. 2d 459 (1991).

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Preliminary Statement	1
Statement of Facts	1
A. Statutory Background	3
B. Petitioner's Actions Under the Loft Law	6
C. The Underlying Actions	11
D. The Motions Under Appeal	11
Reasons for Denying the Writ	15
I. Petitioner Never Raised Any Federal Question in the State Court Proceedings.	15
II. All of the Constitutional Issues Raised in the Petition Have Been Passed Upon by the Federal Courts, Including the Supreme Court of the United States.	15
III. Petitioner is Mistaken in Claiming That the Loft Law was Retroactively Applied to Deprive Petitioner of its Rents.	16

Contents

Page

Conclusion 19

TABLE OF CITATIONS

Cases Cited:

Baum Residence Corp. v. Van Rosson, 206 Misc. 315, 134 N.Y.S. 2d 302 (App. Term 1st Dep't 1954) 17

Carmel v. Appleton, 122 N.Y.S. 2d 195 (App. Term 1st Dep't 1953) 17

County Dollar Corp. v. Douglas, 160 A.D. 2d 537, 161 A.D. 2d 370, 556 N.Y.S. 2d 533 (1st Dep't 1990) ... 18

40 Clinton Street Associates v. Dolgin, 126 Misc. 2d 373, 481 N.Y.S. 2d 960 (Civ. Ct., N.Y. Co. 1984) ... 17

Grossman v. M.K.F. Realty Corp., 155 Misc.2d 841, 590 N.Y.S. 2d 1011 (Sup. Ct., N.Y. Co. 1992) 14

Guarino v. Timares, 196 Misc. 414, 94 N.Y.S. 2d 262 (App. Term 2nd Dep't 1949), *appeal denied*, 276 A.D. 847, 93 N.Y.S. 2d 734 (2nd Dep't 1949) 17

Hornfield v. Gaare, 130 A.D. 2d 398, 515 N.Y.S. 2d 258 (1st Dep't 1987) 17

640 Broadway Renaissance Co. v. Cuomo, 740 F. Supp. 1023 (S.D.N.Y. 1990), *aff'd*, 927 F.2d 593 (1991), *cert. denied*, 500 U.S. 933, 111 S. Ct. 2054, 114 L. Ed. 2d 459 (1991) ..... i, 1, 15

Contents

Page

Spring Realty Co. v. New York City Loft Board, 127 Misc. 2d 1090, 487 N.Y.S. 2d 973 (Sup. Ct., N.Y. Co. 1985), *aff'd*, 117 A.D. 2d 1029, 498 N.Y.S. 2d 241 (1st Dep't 1986), *aff'd as modified on other grounds*, 69 N.Y. 2d 657, 511 N.Y.S. 2d 830, 503 N.E. 2d 1367 (1986), *appealed dismissed for want of a substantial federal question*, 482 U.S. 911, 107 S. Ct. 3179, 96 L. Ed. 2d 668 (1987) 1, 16

Vlachos v. New York City Loft Board, 118 A.D. 2d 378, 504 N.Y.S. 2d 649 (1st Dep't 1986) 3

Waters v. Panzella, 100 N.Y.S. 2d 214 (Mun. Ct. Queens Co. 1950) 18

Ying Lung Corp. v. Medrano, 123 Misc. 2d 1074, 475 N.Y.S. 2d 772 (Civ. Ct. N.Y. Co. 1984) 17, 18

Statutes Cited:

Multiple Dwelling Law:

Article 7-C ..... *passim*

§ 4 16

§ 280 3

§§ 280-287 ..... 3, 4

§ 281 5

Contents

	Page
§ 281[1][ii]	5
§ 282	4, 6, 8
§ 284	4, 10
§ 284[1][i][D]	11
§ 284(1)	12
§ 284(2)	6
§ 285(1)	4, 18
§ 285(2)	5
§ 285(5)	4
§ 286[3]	4
§ 301	5, 12, 17
§ 301(1)	12, 16, 17
§ 302	17
§ 302(1)(b)	11, 12, 17, 18
§ 325	6
28 U.S.C. § 1257	15

Contents

Page

CPLR § 217 10

CPLR § 3214(b) 12

Other Authorities Cited:

Loft Board Hardship Regulations § 2-03(a)(2)(i) 4

Zoning Resolution § 12-10 3

Zoning Resolution § 42-14(D)(1)(b) 2

Zoning Resolution § 74-78 *et seq.* 2, 3

PRELIMINARY STATEMENT

Respondents submit this brief in opposition to the petition of 640 Broadway Renaissance Co. for a writ of certiorari. As will be shown, the petition, which is replete with misstatements of fact and law, must be denied, because at no stage of the state court proceedings did petitioner raise any federal questions. Moreover, the constitutional issues identified in the instant petition were addressed and rejected by this Court in *Spring Realty Co. v. New York City Loft Board*, 127 Misc. 2d 1090, 487 N.Y.S. 2d 973 (Sup. Ct., N.Y. Co. 1985), *aff'd*, 117 A.D. 2d 1029, 498 N.Y.S. 2d 241 (1st Dep't 1986), *aff'd as modified on other grounds*, 69 N.Y. 2d 657, 511 N.Y.S. 2d 830, 503 N.E. 2d 1367 (1986), *appealed dismissed for want of a substantial federal question*, 482 U.S. 911, 107 S. Ct. 3179, 96 L. Ed. 2d 668 (1987). Indeed, petitioner raised the identical issues in a federal court action which was dismissed on the ground that the *Spring Realty* case constituted a binding precedent. *See 640 Broadway Renaissance Co. v. Cuomo*, 740 F. Supp. 1023 (S.D.N.Y. 1990), *aff'd*, 927 F.2d 593 (1991), *cert. denied*, 500 U.S. 933, 111 S. Ct. 2054, 114 L. Ed. 2d 459 (1991).

STATEMENT OF FACTS

By the instant petition, 640 Broadway Renaissance Co. seeks review of an order of the Appellate Division, First Department, of the Supreme Court of the State of New York which, *inter alia*, affirmed 16 orders of the Supreme Court, New York County, granting summary judgment to respondents. Except for minor factual differences, all of the motions were the same and involved identical questions of law.

Petitioner, 640 Broadway Renaissance Co., is the fee owner and landlord of premises known as 640 Broadway, New York, New York (hereafter, the "Building"). The Building is a nine-

story structure containing various commercial units on the ground floor and twenty residential units on the second through ninth floors. Temple Smith, Maureen Albert-Eisner, John Eisner, Robert Rossitor, Leslie Holtan, Loren Calaway, Richard Yoder, Charles Searles, Kathleen Spicer, Rafael Barrios, Juliet Holland, Joel Hinman, Hanna Eschel, Brandon Krall, Kenneth Delap, Nancy Hoffman, Ruth Holloman, Kim Steele, Rina Peleg, Donna Goodman and Marie-Paule Fauque (the "Respondents") were, at the commencement of the lawsuit, all residential tenants who were determined by the New York City Loft Board to be entitled to the protections of Article 7-C of the Multiple Dwelling Law[1] (hereafter referred to as the "Loft Law"). The remaining defendants in the underlying action are either former tenants or occupants of various units in the Building, trade names under which various tenants have operated businesses or persons unknown to Respondents.

The Building is located on the corner of Broadway and Bleecker Streets, an area designated under the New York City Zoning Resolution (the "ZR") as M1-5B. The Building has a certificate of occupancy, issued on May 17, 1966, which permits solely commercial and manufacturing uses. The structure occupies approximately 5,000 square feet (R-702-5).[2] According to ZR § 42-14(D)(1)(b), a building on Broadway — like the instant premises — with a lot coverage exceeding 3,600 square feet in an M1-5B zoning district may be converted to residential use for joint living-work quarters for artists upon approval by the City Planning Commission of a special permit

---

1. Excerpts from that determination are annexed to the petition for a writ of certiorari (the "Petition") as Appendix P (pages 83a-106a).

2. References to the record below are indicated by "R" followed by the appropriate page number.

filed pursuant to § 74-782 of the Zoning Resolution.[3] On or about June 3, 1982, Martin R. Fine, on behalf of petitioner, filed such a special permit application with the New York City Planning Commission for permission to convert floors two through nine at 640 Broadway to joint living-working quarters for artists (R-724-40).

A. Statutory Background

On June 21, 1982, the New York State Legislature enacted Multiple Dwelling Law ("MDL") §§ 280-287 (Chapter 349 of the Laws of 1982) in response to a pressing public emergency created by the unregulated conversion of loft space in New York City from commercial to residential use without compliance with applicable building codes and laws regarding minimum health and safety standards. *See* MDL § 280. A succinct statement of the remedial purposes of the Loft Law is provided by the Appellate Division of the New York State Supreme Court, First Department, in *Vlachos v. New York City Loft Board*, 118 A.D. 2d 378, 504 N.Y.S. 2d 649 at 651 (1st Dep't 1986):

> Multiple Dwelling Law article 7-C (Secs. 280-287, the "Loft Conversion Law") was enacted (L. 1982, c. 349, sec. 1) to alleviate the serious housing shortage in New York City and the dangerous living conditions

---

3. Under the Zoning Resolution, "joint living-work quarters for artists" and "special permit" are terms of art. "Joint living-work quarters for artists", defined at ZR § 12-10, is a category of dwelling allowed in an otherwise nonresidential building. A "special permit" is a procedure by which the New York City Planning Commission may, upon a specified application, permit conversion to residential use — including, specifically, joint living-work quarters for artists — in M1-5B zones. The procedures for special permits are set out at ZR § 74-78 *et seq.*

> created in part by the illegal conversion of commercial and manufacturing loft buildings to residential use without compliance with applicable building codes and laws including local housing maintenance standards. The law sought to prevent the "great hardship" that would occur if tenants were forced to relocate because of their uncertain status in these illegally converted buildings.

To abate this public emergency, the Loft Law requires subject owners to bring their buildings up to code as class A multiple dwellings within a specified timetable set out at MDL § 284. In an effort to balance the equities between landlords and tenants, the cost of legalization, initially borne by the owners, is passed along to protected tenants in the form of rent increases pursuant to a formula established at MDL § 285(5). Once the building achieves code compliance, protected units are then made subject to the Rent Stabilization Law (MDL § 286[3]).

MDL § 285(1) permits an owner to collect rent during the legalization process, but only on condition that the owner register the building with the Loft Board and comply with the legalization timetables of MDL § 284. Owners who might suffer unjustifiable hardship because of the cost of legalization were given the opportunity to gain exemption from the Loft Law by filing a hardship application with the New York City Loft Board within nine months of establishment of the Loft Board.[4] The Loft Law defines "unjustifiable hardship" as either an inability to make a "reasonable return on the owner's investment" or the necessity, upon conversion of the building to residential use, for

---

4. Pursuant to MDL §282, the Mayor of the City of New York was given 90 days from the effective date of the Loft Law to establish the Loft Board. Consequently, the deadline for the filing of a hardship exemption was set at June 30, 1983. Loft Board Hardship Regulations § 2-03(a)(2)(i).

displacement of conforming-use commercial tenants. *See* MDL § 285(2).[5]

In order to identify buildings subject to the Loft Law, the Legislature established a category of buildings called "interim multiple dwellings". The Legislature defined interim multiple dwellings in § 281 of the MDL as any building or portion of a building located in a city of more than one million persons which:

(a) at any time was occupied for manufacturing, commercial or warehouse purposes;

(b) lacks a certificate of occupancy pursuant to § 301 of the MDL[6];

(c) was occupied for residential purposes by three or more families living independently of one another during the period April 1, 1980 through December 1, 1981[7]; and

---

5. At footnote 8 on page 9 of the Petition, petitioner disingenuously alleges that it was prevented from filing a hardship exemption, because the New York City Loft Board did not determine the question of coverage of the building until 1988. In fact, the Loft Law and the New York City Loft Board Rules and Regulations allow an owner to file a hardship application and contest coverage at the same time. Moreover, the record is clear that petitioner was aware of its obligations under the Loft Law well before the June 30, 1983 hardship deadline, since it attempted to register the building with the Loft Board in January, 1983 (R-560-9).

6. A certificate of occupancy pursuant to MDL § 301 is a certificate which authorizes residential use of three or more dwellings in a building. Because 640 Broadway's certificate of occupancy allows only commercial use, the Building "lacks a certificate of...occupancy pursuant to § 301" (MDL §281[1][ii]), and therefore, qualifies for Loft Law coverage.

7. The purpose of this requirement is to ensure that the Loft Law only (Cont'd)

(d) is located in a zoning area which permits residential use either as of right, by special permit, administrative certification or any other means other than a zoning variance.

The Loft Law is administered by an agency known as the New York City Loft Board. MDL § 282. Every owner of an interim multiple dwelling was required to file, within sixty days of the effective date of the statute, a registration statement with the New York City Loft Board setting forth information required under MDL § 325 (the statute which sets out registration requirements for multiple dwellings) as well as additional information as required by regulations promulgated by the Loft Board. *See* MDL § 284(2).

B. Petitioner's Actions Under the Loft Law

Petitioner's involvement with the Loft Law is a chronicle of deliberate intransigence calculated to frustrate the letter and purpose of the statute. Petitioner's actions — and inaction — reveal not only a callous indifference to Respondents' rights, but petitioner's thorough understanding of the legal obligations imposed by the Loft Law, coupled with a studied determination to ignore those obligations.

On or about January 31, 1983, within the applicable time limit for registration, petitioner filed an application to register the Building as an interim multiple dwelling with the New York City Loft Board (R-563-4). According to an attachment to the

---

(Cont'd)
applies to buildings which had been *illegally* converted from residential to commercial use. This is accomplished by restricting coverage to buildings which were, in fact, occupied by three or more families, but had a certificate of occupancy which allowed either no residential use (as is the case at 640 Broadway) or residential use by less than three families.

application, the application was filed "UNDER PROTEST AND UNDER DURESS" (R-564).

By letter dated March 7, 1983, the Loft Board notified petitioner that it was rejecting the registration application as incomplete, since it did not contain information required by Loft Board regulations, including the names of each of the general partners of 640 Broadway Renaissance Co., a 24-hour phone number for emergency repairs and copies of leases for individual units in the Building (R-565-6).

In response, Martin R. Fine, on letterhead identifying himself as petitioner's attorney[8], wrote to the Loft Board, stating, *inter alia*, that he did "not believe that you have any right to any further information other than the name of the owner and the registered managing agent as previously set forth in the application" (R-567-8). In addition, Mr. Fine claimed that the request for copies of all leases in the Building was "an unlawful and unconstitutional invasion of privacy". Mr. Fine further threatened:

> IN THE EVENT AN INTERIM MULTIPLE DWELLING REGISTRATION NUMBER IS NOT IMMEDIATELY ISSUED, the undersigned has been instructed to immediately commence legal proceedings to require the issuance of said Interim Multiple Dwelling Registration number as provided by law.

Counsel to the New York City Loft Board answered Mr. Fine in a letter dated April 11, 1983, informing him that no registration

---

8. This is the same attorney representing 640 Broadway Renaissance Co. in the instant petition for a writ of certiorari.

number would be issued for the Building until the requested information was supplied (R-569). Subsequently, petitioner took no further action to register the Building (or comply in any other way with the Loft Law) until August 1991 (R-696).

Because of petitioner's refusal to register the Building with the Loft Board and otherwise comply with the health and safety requirements of the Loft Law, various residential tenants of the Building filed an application on August 6, 1983 with the New York City Loft Board for a determination that 640 Broadway was an interim multiple dwelling.[9] Pursuant to that application, the agency conducted a 25-day hearing in which the tenants called 27 witnesses and submitted over 250 exhibits (R-524). In its decision after the hearing (R-522-60), the Loft Board confirmed that the Building was an interim multiple dwelling subject to all the requirements of the Loft Law. The Loft Board also specifically found that petitioner not only knew that the premises were all along being used for residential purposes, but that petitioner and its employees actively encouraged Respondents to live in their lofts:

---

9. Petitioner makes much of the fact that the Loft Board did not designate the building as an interim multiple dwelling until 1988. Petitioner thereby suggests that the onus was on the Loft Board or the tenants to place the building within the jurisdiction of the Loft Board. The *exact* opposite is the case. MDL § 282 clearly defines what buildings are subject to the law, and MDL § 282 unequivocally requires owners to register their buildings within 60 days of the effective date of the Loft Law. It was petitioner's obdurate refusal to perform this obligation which prompted the tenants to apply to the Loft Board for a determination of Loft Law coverage. The point is not a minor one, in light of petitioner's attempt to portray itself as having been foreclosed from taking advantage of various Loft Law deadlines. The Loft Board's determination of coverage (R-522-62) makes clear that petitioner was dragged kicking and screaming down the path of Loft Law compliance. Indeed, to this day, without explanation or excuse, petitioner has not legalized the Building as a class A multiple dwelling.

> Behind the bluster of the owner's voluminous constitutional and procedural challenges to coverage lies the indisputable fact that the owner's conduct and statements, from 1978 when it purchased the building until at least 1982, expressly recognized the residential use of the upper eight floors. During this time, according to the credible and unrebutted testimony of nearly all the tenants, the owner was leasing for "lofts" and even had some tenants (especially Ms. Eschel) fill out application forms asking about roommates and pets, hardly items of concern for a commercial tenancy. At the same time the owner's employees were personally assuring tenants that it was not only acceptable but preferable for them to live in the building, going so far as to approve floor plans for kitchens and bathrooms, recommend electricians and plumbers, and help procure homeowner's insurance.[10]

(Petition, Appendix P at 99a).

The determination of the New York City Loft Board establishing that Respondents are statutory tenants was made on April 28, 1988. Petitioner never appealed the determination, and

---

10. This is an area in which the petitioner has misled this Court. All of petitioner's statements in its Petition are carefully constructed to suggest, without actually stating, that petitioner rented all the units in the Building to commercial tenants (*see, e.g.*, Petition at 5-6). Nevertheless, what petitioner omits to inform the Court is that all 16 Respondents, to petitioner's knowledge, were residential tenants who made clear that they intended to live in their units. As the Loft Board found, notwithstanding the form of the leases, petitioner not only condoned, but encouraged respondents to live in their lofts.

the statute of limitations for such an appeal has long since expired. New York State Civil Practice Law and Rules ("CPLR") § 217.

Notwithstanding the indisputable fact that the Building has been subject to the Loft Law since June 21, 1982,[11] Petitioner steadfastly refused to register the Building, comply with the legalization requirements of the Loft Law or even recognize Respondents as tenants. Although MDL § 284 requires Loft Law buildings to have been brought up to code as class A multiple dwellings by June 21, 1985, at the time of the last rents sought in the underlying action (August, 1992), petitioner had not lifted a finger to legalize 640 Broadway. In fact, petitioner's only legalization action to that time was to take a giant step backward by withdrawing its 1982 City Planning Commission application for a special permit to convert the Building to joint living-work quarters for artists. Petitioner took this step in July 1985, during the course of its losing efforts at the Loft Board coverage hearings. Apparently, as it become clear to petitioner that it would have to legalize the Building as a class A multiple dwelling, petitioner withdrew the special permit application in order to create further impediments to legalization. (*See* footnote at R-525 and R-747-9).

Other than the withdrawal of its special permit application, petitioner did not even claim to have performed a single act in connection with the legalization of the Building from the date the Loft Law was enacted (June 21, 1982) through the date of the last rents sought in the underlying action (August 31, 1992).[12]

---

11. Section 3 of Ch. 349 of L. 1982 provides that the Loft Law shall "take effect immediately" on June 21, 1982.

12. Petitioner contends at page 4 of the Petition that "it was uncontroverted that (a) 640 Broadway is not structurally suited to serve as a residential (Cont'd)

C. The Underlying Actions

In 1988, five years after the Loft Law was enacted and three years after the building was required to have been fully legalized as a class A multiple dwelling (*see* MDL § 284[1][i][D]), Respondents began to withhold their rent in an effort to force petitioner to undertake its statutory duty to bring the building up to code (R-519-20). Nevertheless, it was not until four years later, with the commencement of the instant actions in October, 1992, that petitioner took any steps to collect its rent.

In the complaints (R-137-243), petitioner asserted three causes of action. The first cause of action was for rent "through and including August 31, 1992" (*see, e.g.*, R-139-40); the second cause of action was for attorneys' fees (*see, e.g.*, R-140-1); and the third cause of action was for "indemnification" based on Respondents' activities which, according to petitioner, had the effect of "subjecting the premises to the provisions of the Loft Law" (*see, e.g.*, R-141-2).

At about the same time, petitioner also commenced summary non-payment proceedings against Respondents in the Housing Part of Civil Court for current rent, beginning with September, 1992 (R-516, n. 6, R-637).

D. The Motions Under Appeal

By notices dated January 6, 1993 (*see, e.g.*, R-509-10), Respondents moved pursuant to CPLR Rule 3212 for summary judgment dismissing the complaints on the ground that MDL

(Cont'd)
'multiple dwelling'. . . and (b) up to Two Million Dollars ($2,000,000) would have to be expended to reconstruct this building to convert it into a multiple dwelling . . ." If these claims are uncontroverted, it was because petitioner never made any such allegations in the courts below.

§ 302(1)(b) barred petitioner from collecting rent during the periods sought in the instant actions when petitioner was in violation of its legalization obligations under MDL §§ 284(1) and 301(1).

In opposition, petitioner argued that amendments to the Loft Law enacted pursuant to Chapter 227 of the Laws of 1992 were intended to be retroactively applied such that petitioner could collect rents for periods when it had defiantly refused to comply with the Loft Law's legalization timetable. Petitioner also made the audacious argument that its own deliberate withdrawal of the special permit application tolled (and, presumably, to this day continues to toll) the Loft Law's original legalization timetable, so that petitioner has never been out of compliance with its code compliance obligations.[13] Significantly, Petitioner raised no federal question of any kind in the motion.

Petitioner also cross-moved for orders (a) striking Respondents' answers or, alternatively, vacating the automatic stay of discovery pursuant to CPLR 3214(b); (b) sanctioning Respondents for their allegedly willful failure to submit to disclosure; (c) granting petitioner leave to amend its complaints to add a cause of action for constructive trust; (d) granting petitioner leave to amend its replies; and (e) directing Respondents to pay use and occupancy prospectively during the course of the action (*see, e.g.*, R-617-8).

The motions and cross-motions were disposed of by decision dated July 12, 1993, pursuant to which Justice Joan B. Lobis granted Respondents' motion for summary judgment and

---

13. This argument is in marked contrast to petitioner's position here, where petitioner claims that it did "not want or need" a special permit but was forced to apply for one under penalties provided by the Loft Law (Petition at 3). In fact, petitioner applied for a special permit *before* the Loft Law was enacted and withdrew the application in response to the Loft Law.

denied petitioner's cross-motions in all respects (the decision is annexed as Appendix C to the Petition at 5a-11a). Justice Lobis determined that there were no triable issues of fact, since it was clear that petitioner had taken no action to meet its legalization obligations under the Loft Law until September, 1992, which was after the last rents claimed in the complaints. Justice Lobis further recognized the fallacy of petitioner's argument that the withdrawal of its own special permit application had relieved petitioner of the obligation to legalize the building:

> Plaintiff's argument that it was in compliance with the provisions of the Loft Law prior to the amendments is rejected. According to plaintiff, the statutory timetables originally set forth in the Loft Law did not take effect until plaintiff obtained a special permit. Since plaintiff never obtained a special permit, it claims it has always been in compliance with the Loft Law. What plaintiff fails to acknowledge in its argument is that the only reason plaintiff never obtained a special permit for the building was that plaintiff withdrew it application for a special permit. . . .The Loft Law specifically provides that a landlord "shall take all reasonable and necessary action to obtain a certificate of occupancy as a Class A multiple dwelling" within three years of the effective date of the Loft Law. Here, plaintiff violated the foregoing provision of the Loft Law by failing to pursue and actually withdrawing its application for a special permit.

(Petition, Appendix at 9a).

Similarly, Justice Lobis rejected petitioner's contention that the 1992 amendments to the Loft Law were intended to be retroactively applied to allow owners to collect rents during periods when they were not in compliance with the Loft Law's original legalization timetable. On this point, Justice Lobis cited her own holding in *Grossman v. M.K.F. Realty Corp.*, 155 Misc. 2d 841, 590 N.Y.S. 2d 1011 (Sup. Ct., N.Y. Co. 1992), a case which, subsequent to the decision in the instant actions, was affirmed by the Appellate Division, First Department, at 203 A.D. 2d 129, 610 N.Y.S. 2d 247 (1994). In her decision, Justice Lobis neither discussed, nor resolved, any federal questions.

Orders were entered pursuant to Judge Lobis' decision on November 15, 1993 (R-9-56).

Petitioner appealed Judge Lobis' decision to the Appellate Division of the Supreme Court of the State of New York. Once again, petitioner raised no federal questions. That appeal was decided by an order entered with the Clerk of the Court on February 7, 1995 (annexed as Appendix B to the Petition at 3a-4a) affirming the orders of the Court below. In its decision, the Court neither discussed nor resolved any federal questions.

Petitioner then moved for leave to appeal to the Court of Appeals. In its motion papers, petitioner, for the first time, raised a constitutional question, but the question was whether the Loft Law offended the Constitution of the State of New York, *not* the United States Constitution. That motion was denied by order of the Court of Appeals dated September 7, 1995 (annexed as Appendix A to the Petition).

REASONS FOR DENYING THE WRIT

I.

PETITIONER NEVER RAISED ANY FEDERAL QUESTION IN THE STATE COURT PROCEEDINGS.

At no time did petitioner *ever* assert any federal question of any kind during the state court proceedings. Neither at the trial level, at the Appellate Division, nor at the Court of Appeals, did petitioner assert any right under the United States Constitution or under any law of the United States. In addition, none of the Courts involved passed on any federal question. Consequently, under 28 U.S.C. § 1257, the Supreme Court of the United States is without jurisdiction to review the state court judgment in this case.

II.

ALL OF THE CONSTITUTIONAL ISSUES RAISED IN THE PETITION HAVE BEEN PASSED UPON BY THE FEDERAL COURTS, INCLUDING THE SUPREME COURT OF THE UNITED STATES.

This is not the first time that petitioner has raised the same constitutional questions regarding the Loft Law and its application to the very building at issue in the instant case. In *640 Broadway Renaissance Co. v. Cuomo*, 740 F. Supp. 1023 (S.D. N.Y. 1990), *aff'd*, 927 F.2d 593 (1991), *cert. denied*, 500 U.S. 993, 111 S. Ct. 2054, 114 L. Ed. 2d 459 (1991), petitioner brought a federal court action regarding the building located at 640 Broadway, and, *inter alia*, requested a declaration that the Loft Law was unconstitutional. In his decision dismissing the complaint, the District Court Judge painstakingly analyzed all of the constitutional issues — the exact same constitutional issues

presented here — and found that they were insubstantial or had been rejected by the Supreme Court of the United States in *Spring Realty Co. v. New York City Loft Board*, 127 Misc. 2d 1090, 487 N.Y.S. 2d 933 (Sup. Ct., N.Y. Co. 1985), *aff'd*, 117 A.D. 2d 1029, 498 N.Y.S. 2d 241 (1st Dep't 1986), *aff'd as modified on other grounds*, 69 N.Y. 2d 657, 511 N.Y.S. 2d 830, 503 N.E. 2d 1367 (1986), *appealed dismissed for want of a substantial federal question*, 482 U.S. 911, 107 S. Ct. 3179, 96 L. Ed. 2d 668 (1987).

III.

PETITIONER IS MISTAKEN IN CLAIMING THAT THE LOFT LAW WAS RETROACTIVELY APPLIED TO DEPRIVE PETITIONER OF ITS RENTS.

Petitioner argues that the Loft Law was somehow retroactively applied to deprive petitioner of its rents at 640 Broadway. Petitioner's analysis of the law is entirely incorrect. In fact, the Loft Law was intended to have the opposite effect: to allow petitioner to collect rent which it otherwise would have been barred from collecting.

Long before the Loft Law was enacted, and long before petitioner acquired title to the Building, the New York State Multiple Dwelling Law prohibited an owner from collecting rent in a building which contained residential tenants in violation of the building's certificate of occupancy. Thus, MDL § 301(1) provides in relevant part:

> No multiple dwelling[14] shall be occupied in

---

14. A "multiple dwelling" is defined at MDL § 4 as "a dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied as the residence or home of three or more families living independently of each other".

> whole or in part until the issuance of a certificate by the department that said dwelling conforms in all respects to the requirements of this chapter, to the building code and rules and to all other applicable law . . .

The penalties for violation of MDL § 301(1) were in existence for decades before the Loft Law was enacted. Those penalties are at § 302(1)(b), and to the extent relevant here, provide:

> If any dwelling or structure be occupied in whole or in part for human habitation in violation of section three hundred one, during such unlawful occupation . . . [n]o rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefor, or for possession of said premises for non-payment of such rent.

Before and after enactment of the Loft Law, the Courts of New York State repeatedly applied MDL §§ 301 and 302 to bar owners who failed to obtain proper certificates of occupancy from maintaining any action or proceeding to recover rents from their tenants. *Hornfeld v. Gaare*, 130 A.D. 2d 398, 515 N.Y.S. 2d 258 (1st Dep't 1987); *Baum Residence Corp. v. Van Rosson*, 206 Misc. 315, 134 N.Y.S. 2d 302 (App. Term 1st Dep't 1954); *Carmel v. Appleton*, 122 N.Y.S. 2d 195 (App. Term 1st Dep't 1953); *Guarino v. Timares*, 196 Misc. 414, 94 N.Y.S. 2d 262 (App. Term 2nd Dep't 1949), *appeal denied*,, 276 A.D. 847, 93 N.Y.S. 2d 734 (2nd Dep't 1949); *40 Clinton Street Associates v. Dolgin*, 126 Misc. 2d 373, 481 N.Y.S. 2d 960 (Civ. Ct. N.Y. Co. 1984); *Ying Lung Corp. v. Medrano*, 123 Misc. 2d 1074, 475

N.Y.S. 2d 772 (Civ. Ct. N.Y. Co. 1984); *Waters v. Panzella*, 100 N.Y.S. 2d 214 (Mun. Ct. Queens Co. 1950).

The Loft Law, far from preventing petitioner from collecting rents at 640 Broadway, actually provided petitioner an opportunity to avoid the penalties of § 302(1)(b). Thus, the Loft Law at MDL § 285(1) provides:

> Notwithstanding the provisions of section three hundred two or three hundred twenty-five of this chapter, the owner of an interim multiple dwelling may recover rent payable from residential occupants qualified for the protection of this article on or after April first, nineteen hundred eighty, and maintain an action or proceeding for possession of such premises for non-payment of rent, *provided that he is in compliance with this article.*

(Emphasis added).

Thus, as can be seen, the Loft Law *enables* an owner, who would otherwise be foreclosed by MDL § 302(1)(b) from collecting rent, the opportunity to collect and sue for such rent on condition that it abide by the legalization and registration requirements of the Loft Law. *See, e.g., County Dollar Corp. v. Douglas*, 160 A.D. 2d 537, 161 A.D. 2d 370, 556 N.Y.S. 2d 533 (1st Dep't 1990).

The fact that petitioner could not collect rent in the underlying action has nothing to do with penalties provided by the Loft Law, and every thing to do with petitioner's deliberate intransigence in taking advantage of the opportunities afforded by the Loft Law.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

DAVID RATNER
Counsel of Record
HARTMAN, ULE, ROSE
& RATNER
Attorneys for Respondents
305 Broadway, Suite 1201
New York, N.Y. 10007
(212) 437-9110

Supreme Court, U.S.
FILED
MAR 27 1996
CLERK

No. 95-959

In The

Supreme Court of the United States

October Term, 1995

640 BROADWAY RENAISSANCE CO.,

Petitioner,

vs.

JOHN EISNER, et al. and 15 Other Cases Consolidated for Purposes of a Joint Appeal,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department

REPLY BRIEF FOR PETITIONER

MARTIN R. FINE
Counsel of Record
Attorney for Petitioner
644 Broadway
New York, New York 10012
(212) 477-1155

TABLE OF CONTENTS

Page

Table of Contents i

Table of Contents - Reply Appendix..... iii

Table of Authorities..... v

Reasons for Granting the Writ.....

I - FEDERAL QUESTIONS HAVE BEEN RAISED FOR MORE THAN 10 YEARS - THE NEW YORK COURTS HAVE SIMPLY IGNORED THEM 1

II - THIS CASE IS OF GREAT PUBLIC IMPORT-ANCE BECAUSE (a) IT DIRECTLY AFFECTS THE ECONOMIC FUTURE OF MORE THAN 800 SUBSTANTIAL BUILDINGS IN NEW YORK; (B) MANY BUILDINGS HAVE MORTGAGES FROM BANKS WHICH ARE EITHER FEDERALLY INSURED OR REGULATED; (C) THIS UNFETTERED STATE SEIZURE OF PROPERTY WILL SEV-ERELY IMPACT ON THE FUTURE OF PRIVATE INVESTMENT IN REAL ESTATE, BANKING AND FINANCE IN THE CITY AND STATE OF NEW YORK, AND, *ERGO,* NATIONALLY.....4

III - IF A STATE LEGISLATURE IS PERMITTED TO RETROACTIVELY ENACT MASSIVE UNCONSTITUTIONAL VIOLATIONS, BY THE SIMPLE USE OF SELF-CREATED 'EMERGENCY' VERBIAGE, THEN THERE IS NO CONSTITUTION.....5

IV. THIS RETROACTIVE LEGISLATIVE GRANTING OF PROPERTY RIGHTS TO PERSONS WHO, BY DEFINITION, COMMITTED CRIMINAL ACTS BY ILLEGALLY RESIDING IN "LOFT' BUILDINGS, EITHER AS A REWARD FOR THEIR PAST

CRIMINAL CONDUCT OR AS "PUNISHMENT" TO OWNER - IS AN UNCONSTITUTIONAL SEIZURE OF PETITIONER'S PROPERTY AND IMPAIRMENT OF CONTRACT.....7

V - NEITHER *SPRING REALTY CO. V. NEW YORK CITY LOFT BOARD* NOR *640 BROADWAY RENAISSANCE CO. V. CUOMO ET AL*, ARE CONTROLLING PRECEDENT HEREIN.....8

VI - THE RESPONDENTS "SPECIAL PERMIT" ARGUMENTS ARE PURE RED HERRINGS.....9

CONCLUSION.....10

TABLE OF CONTENTS-REPLY APPENDIX

		PAGE
Q.	EXCERPT FROM PETITIONER'S BRIEF DATED SEPTEMBER 21, 1994 TO NY APPELLATE DIVISION.	107a
R.	RIDER ANNEXED TO AND MADE PART OF INTERIM MULTIPLE DWELLING REGISTRATION APPLICATION.	111a
S.	AFFIDAVIT OF HYMAN SCHERMER SWORN TO APRIL 15, 1993.	113a
T.	EXCERPTS OF LEASE CLAUSES ALL ABROGATED BY THE "LOFT LAWS"	117a
U.	OMITTED	
V.	LOFT BOARD RULES & REGULATIONS (EXCERPTS) DATED JANUARY 27, 1983.	128a
W.	VILLAGE VOICE ADVERTISEMENT, FEBRUARY 13, 1996, p. 99.	134a
X.	LOFT BOARD RULES (EXCERPTS) - NOVEMBER 30, 1982.	135a
Y.	LETTER FROM LOFT BOARD (EXCERPTS) TO LOFT OWNERS DATED DECEMBER 29, 1983	141a
Z.	N.Y. TIMES ARTICLE DATED OCTOBER 21, 1986.	144a
AA.	1992 LOFT LAW AMENDMENTS (EXCERPTS).	149a
BB.	ABSTRACT FROM THE "FEDERALIST PAPERS"; PENGUIN BOOKS EDITION, 1987.	154a

page

CC. N.Y. TIMES ARTICLE DATED JUNE 12, 1988. 158a

DD. EXTRACTS FROM AFFIDAVIT OF PLAINTIFF DATED JUNE 28, 1989 IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT. 164a

EE. EXTRACTS FROM AFFIDAVIT IN OPPOSITION TO CROSS MOTION IN SECTION 1983 CASE. 178a

FF. EXTRACTS FROM AFFIDAVIT OF BRUCE H. WIENER, DATED MARCH 10, 1995, IN SUPPORT OF MOTION FOR REARGU MENT, OR ALTERNATIVELY, LEAVE TO APPEAL TO THE COURT OF APPEALS. 189a

GG. EXTRACTS FROM AFFIDAVIT OF JOSEPH P. LOMBARDI, DATED MARCH 10, 1995, IN SUPPORT OF MOTION FOR REARGUMENT, OR ALTERNATIVELY, LEAVE TO APPEAL TO THE COURT OF APPEALS. 193a

HH. EXTRACTS FROM REPLY AFFIRMATION OF BRUCE H. WIENER DATED 3/24/95 IN FURTHER SUPPORT OF MOTION FOR REARGUMENT, OR ALTERNATIVELY, LEAVE TO APPPEAL TO THE COURT OF APPEALS 195a

II. LOFT BOARD REGULATIONS, MAY 1983 199a

TABLE OF AUTHORITIES

Cases Cited:	**Page**
Agins v. Tiburon, 447 U.S. 255, 260 (1980)	6
Lindsey v. Normet, 405 U.S.56, 72-74 *(1972)*	6
Nollan v. California Coastal Commission, 483 U.S. 825 (1987)	6
North Shore Cycles, Inc. v. Yahama Motor Corp. , 919 F2d 1041 (5th Cir. 1990).	8
Rizzo v. Goode, 423 US 362 (1976)	9
640 Broadway Renaissance Co. v. Cuomo, 740 F. Supp.1023 (S.D.N.Y. 1990), *aff'd*, 927 F.2d 593 (1991), *cert. denied, 500* U.S. 933, 1 11 S. Ct. 2054,114 L. Ed.2d 459 (1991)	8, 9
Spring Realty Co. v. New York City Loft Board,127 Misc. 2d 1090,487 N.Y.S. 2d 973 (Sup. Ct., N.Y. Co. 1985), *aff'd*, 117 A.D. 2d 1029, 498 N.Y.S. 2d 241 (lst Dep't 1986), *aff'd as modified on other grounds*, 69 N.Y. 2d 657, 5 11 N.Y.S.2d 830, 503 N.E. 2d 1367 *(1986), appeal dismissed for want of a substantial federal question*, 482 U.S.911, 107 S. Ct. 3179, 96 L.Ed. 2d 668 (1987) 8,9	8, 9

Other Authorities:

Rent Stabilization Law of 1974. *McKinney's Unconsol. Laws §§8600 et seq.*

Board of Regents v. Roth, 408 U.S.564 (1972)

Collins v. Youngblood, 110 S,Ct, *110 S.Ct 2715 (1990)*

Gulfside Distributors, Inc. V. Becco, Ltd. 985F2d (11thCir.1993)

Keystone Bituminous Coal Assn. V. DeBenedictus, 480 U.S. 470

Loretto v. Teleprompter ManhattanCATV, 458 U.S.4 19 (1982)..

Lucas v. Carolina Coastal Commission, 120 L.Ed.2d 798 (1992) and cases cited therein

McDonald's Corp. v. Nelson, 822 F. Supp. 597, *aff'd Holiday Inns Franchising, Inc. V. Branstad*, 29 F.3d 383, *cert. Den'd.,Iowa v. Holiday Inns Franchising, Inc.*, 115 S.Ct. 613.

National Collegiate Athletic Ass'n v. Miller, 795 F.Supp. 1476, (D.Nev. 1992) *aff'd* 10 F.3d 633, *cert. den'd.*, 114 S.Ct.1543 *(Tarkanian)*

19th Street Associates v. State of New York, N.Y.L.J.7/20/90, p. 22 col.5, S.Ct.NY Co.*), aff'd.*, 1st Dept. N.Y.L.J. 4/25/91, p. 24

Selective Service System v. Minnesota Public Interest Research Group., 468 U.S. 841 (1984)

Vernon v. Cassadaga Valley Cent. School Dist., 49 F.3d 886. (2d Cir. 1995

Washington ex rel Seattle Trust Co. V. Roberge, 278 U.S. 116 (1928)

Tyson & Bro. V. Banton, 273 U.S. 418

Multiple Dwelling Law - all sections

Loft Board "Rules" and "Regulations"(hundreds of pages) - not codified - including, in part, those reproduced by Petitioner - these are purportedly issued pursuant to a Mayoral "executive Order". (See App."H"; "V" ; "X" and "II", *e.g.)*

REPLY - I - FEDERAL QUESTIONS HAVE BEEN RAISED FOR MORE THAN 10 YEARS - THE NEW YORK COURTS HAVE SIMPLY IGNORED THEM.

Tenants-Respondents make clear misrepresentations to the Court by claiming Petitioner "never raised any Federal question in the State Court proceedings." In fact, Petitioner devoted pages 36 through 39 of its Brief in the Supreme Court, 1st Dept. App. Div. (September 21, 1994 - Appendix Q) - to Federal questions. Furthermore, Petitioner raised federal constitutional questions at the "Loft Board" hearings themselves; See, Loft Board Order in 1988, Appendix "P", pp. 98, 99; Petitioner stated in its Interim Multiple Dwelling application, dated 1983, that it was filed "under protest" and "under duress", and attached a two page Rider setting forth constitutional objections (Appendix R). In IMD renewal application dated August 14, 1991, Petitioner stated:

> "THIS 'INTERIM MULTIPLE DWELLING' REGISTRATION IS FILED UNDER DURESS, UNDER PROTEST, AND UNDER THREAT OF CRIMINAL PROSECUTION. NO VOLUNTARY WAIVER IS INTENDED OF ANY CONSTITUTIONAL OR OTHER LEGAL RIGHTS THAT OWNER OF THE BUILDING POSSESSES UNDER FEDERAL OR STATE LAW, COMMON LAW, OR THE EXPIRED LEASES FOR THE PREMISES." (EMPHASIS IN ORIGINAL)

Furthermore, in Petitioner's Notice of Motion for Leave to Appeal to New York Court of Appeals, one of the questions presented was:

> "2. Does the Loft Law's effect, as applied by the IAS Court and the Appellate Division, of a permanent forfeiture of rent that accrued prior to a landlord's compliance with the legalization timetables of the 1992 amendments to the Loft Law constitute an unconstitutional regulatory and physical taking of property."

All these documents were public records served upon Respondents and part of Record below.

The real issue herein is whether the Legislature can retroactively reward Respondents' criminal behavior, by confiscating from Petitioner, and granting to Respondents more than a million dollars of rent monies owed, plus granting estates, contrary to owner's fundamental ownership rights, all as part of a retroactive legislative scheme to

transfer substantially all aspect of real estate ownership to the illegal occupants.

The Loft Laws did create this confiscation of rent from Petitioner (from four years to eight years, in some cases), because all these Respondents' leases expired prior to or in 1984, and respondents are only holding over by virtue of legislative leaseholds retroactively granted to them by the Loft Laws - thus making the Multiple Dwelling Law, Sec. 301 "forfeiture provisions" applicable. Were it not for the Loft Laws (of which §301 is a part), Petitioner would not have to suffer these retroactively-imposed, forced (lifetime or longer) leaseholds, and Respondents' claims to 4-8 years of rent-free use of owner's building - based solely upon their own deliberate illegal conduct - would fail.[1]

Furthermore, there was no "public emergency"; simply the greedy desire of a vocal group of a few thousand who persuaded the Legislature into retroactively granting them leaseholds in total annihilation of property rights, and lease contracts that were voluntarily made at arms length. This action is to recover four to eight years of rent owed by various tenants, assignees, sublessees and other occupants of the building, up to and including August, 1992. This legislative transfer of assets to Respondents from Petitioner is confiscatory and punitive.[2]

Furthermore, Petitioner has substantially renovated the building since 1982[3]. The Loft Laws, to rub salt into wounds, not only required a multi-million dollar conversion of the building, retroactively imposed upon it - as a gratuitous windfall and reward to the Legislatively-favored tenants - but also forced the payment of an extortionate monetary penalty,

---

[1] Attached as App "W" is a recent ad in "Village Voice" newspaper wherein a non rent paying occupant of this building is purporting to "sell" "his" loft for $35,000, with a "lifetime" lease. He has paid no rent since 1987.

[2] Another misrepresentation to this Court by Respondents is that Petitioner did nothing to comply with the Loft Laws since 1982 - that is preposterous. In fact, as Respondents admit, Petitioner first filed registration under the Loft Law in 1983, soon after the law was passed - but under protest and duress.

[3] See Appendix "S".

to a New York City agency, calculated at $9-11 per square foot of building[4] - more than $400,000.

The entire basis of this legislation is the deliberate and willful criminal occupation of the buildings by the Respondents - by sleeping in the building - after they signed leases specifically covenanting not to do so. Even assuming *arguendo* that the landlord knew of this illegal occupation by the tenants, it was the tenants who did the illegal occupation - not the owner. The Legislature cannot reward these criminal activities of Respondents by granting of permanent interests in the real estate by retroactive legislative *fiat*, and confiscating years of rent payments; The forfeiture of the rent, necessary to "legalize" the building, is also totally perverse and counter productive; thus there is no rational relationship to any purported problem[5].

Since the Loft Laws were totally retroactive, there was no opportunity to avoid "compliance". The illusory "hardship" exemption lapsed by statute five years before this building was designated, and before a "coverage" application was filed; furthermore the purported "exemption" required "registration" under the statute, with huge forfeit of rights; including the forced recording of a covenant running with the land for 15 years (MDL §285-2); (rendering title unmarketable, and violating mortgage provisions); and required sworn affidavits of complex financial information with respect to future income, expense and capital investment that was unknown or unknowable. The regulations defining "hardship" were published after the exemption period expired. Furthermore, since the statute contained no definition of "hardship"; it is therefore obvious,

---

[4] Of course the Petitioner legally fought and protested this extortionate monetary seizure since it was totally retroactive and confiscatory; the legislative scheme later dropped this extortionate requirement.

[5] Tenants are not bound by any obligation of any kind and are free to vacate the premises at any time, without any penalty or obligation, and are legislatively granted "rights" to sell to strangers, property of the owner and to usurp and pocket such proceeds to their own use and benefit. This is in addition to all the monies that were converted by Respondents who sublet their lofts (at large profits), and did not pay rent to Petitioner, and/or "sold" "their" lofts for large sums, while paying no rent. (See App. W)

as admitted, why no such "hardship" exemption was ever granted. While it is true that Petitioner lawfully resisted the increasingly-confiscatory and burdensome and bankrupting features of the retroactive Loft Laws and resisted the seizures by Legislature of its fundamental property rights, with their gratuitous transfer to Respondents, this is not "without explanation or excuse". The specific damages to Petitioner in this action, (confiscating more than a million dollars of rents owed to it since before September 1992), is only the tip of the iceberg of the staggering damage and imposed burdens upon the Petitioner herein, which have wiped out the concept of property ownership by the whim of the Legislature, for this particular special interest group.

II - THIS CASE IS OF GREAT PUBLIC IMPORTANCE BECAUSE (a) IT DIRECTLY AFFECTS THE ECONOMIC FUTURE OF MORE THAN 800 SUBSTANTIAL BUILDINGS IN NEW YORK; (B) MANY BUILDINGS HAVE MORTGAGES FROM BANKS WHICH ARE EITHER FEDERALLY INSURED OR REGULATED; (C) THIS UNFETTERED STATE SEIZURE OF PROPERTY WILL SEVERELY IMPACT ON THE FUTURE OF PRIVATE INVESTMENT IN REAL ESTATE, BANKING AND FINANCE IN THE CITY AND STATE OF NEW YORK, AND, *ERGO*, NATIONALLY.

The fundamental rights of private property ownership have been eviscerated, by this retroactive confiscation of four to eight years rent (and vast other property rights) at the expense of the Petitioner. In the instant case the legislation was the direct and proximate cause of the bankruptcy of Petitioner herein, and said bankruptcy caused the default in a million dollar mortgage held by a national bank ("L.S.B."); this bank, which like many others, had and has extensive mortgage loans on office/loft buildings in the amounts of hundreds of millions, if not billions of dollars; these are all put at risk by this legislative destruction of private property.

Without rent payments there is no "real estate". L.S.B. was itself forced into insolvency.[6]

It is not merely 640 Broadway which has been legislatively bankrupted - and deprived of rental income (4-8 years worth) retroactively, but at least 800 building owners in New York are at risk. Who will be the target of the next political raid on private property ownership by the next vocal political group to curry legislative favor (next? Teamsters? Doctors? Felons? Plumbers? Firemen? Grand-mothers? Ice-Skaters? Shoemakers?); many other groups-as well as so-called "artists"-are groups supposedly worthy of legislative "protection", but the legislature has no constitutional right to take owners property rights, and hand them over to a favored few, unless the state pays for the taking. What limits are there on the legislature at all, if this kind of arbitrary and irrational, retroactive seizure and redistribution of property rights is permitted?[7] This case is of great public importance to the preservation of private property rights in New York and the United States, and *certiorari* should be granted to prevent this banana republic legislation from spreading like the corrupt fungus it is.

III - IF A STATE LEGISLATURE IS PERMITTED TO RETROACTIVELY ENACT MASSIVE UNCONSTITUTIONAL VIOLATIONS, BY THE SIMPLE USE OF SELF-CREATED 'EMERGENCY' VERBIAGE, THEN THERE IS NO CONSTITUTION.

---

[6] L.S.B. carried many mortgage loans on its books, which became uncollectable after the Loft Laws took effect, and thereafter. L.S.B. had a forced sale of its million dollar mortgage for $350,000 (directly incurring a $650,000 capital loss); many banks, have had and will suffer huge losses in their mortgage portfolios; losses to the banks, federal insurers and/or stock holders, - or the taxpayers.

[7] Can the Legislature constitutionally grant auto owners parked in a certain garage last night, the right to permanently occupy that space, at a fixed and much lower rental than previously agreed to, and retroactively require that not only the garage owner polish and wax the car every night, but also fill it up with gasoline, replace the tires every year, and rebuild the parking space into a heated, air conditioned garage with sufficient plumbing facilities to maintain a chauffeur's apartment-all at no additional cost and, in fact, lowering the agreed upon rent for the space and also nullifying a legally contracted cost of living increase clause?

It cannot be disputed that the New York Legislature, pushed by a small vocal minority of so called "artists", retroactively singled out more than 800 buildings in New York and imposed upon them horrendous and permanent financial and legal burdens, and granted to these few thousand tenants (and even strangers) long term estates in owner's property - based solely upon the illegal sleeping in these buildings by these same tenants, for a retroactively and arbitrarily defined period of April 1,1980 to December 1, 1981 - which period ended 6 months prior to the date of passage of the law in June, 1982. It has never been denied that these arbitrary and retroactive dates chosen - which resulted in 640 Broadway's "designation" as a "loft building" - were established from the existing lists of members of loft tenants associations. This was pure special interest legislation, where the legislature retroactively took a very specific set of facts, all of which occurred prior to the passage of the law, and then retro-actively mandated staggering and bankrupting legal and eco-nomic burdens upon these retroactively targeted owners [8]. The seizure of rent income is the seizure of the real estate itself; furthermore, the Loft Laws rent forfeitures are not rationally related to any legitimate state purpose. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).. [9] *Lindsey v. Normet, supra.*

The Loft Laws grant these deliberate illegal hold-over tenants, as a reward for their past illegal conduct, rent-free occupation of owner's premises for indefinite periods, and legally enforceable long-term interests in the building - creating a new breed of "nobility" - this is proscribed by the Constitution.[10]

---

[8] under the guise of a purported "emergency" in the residential housing market in New York City (said purported "emergency" being a legislative continuation of the Congressional declaration of emergency of 1943 - when the nation was involved in the greatest world war in history).

[9] Even if the Legislature had the power to totally abrogate leases, it could not constitutionally delegate that power to actual tenants and their political cohorts - all appointed by the Mayor. The entire "Loft Board" structure is self-interested and unconstitutional.

[10] These college educated, white-collar "yuppies" - wealthy and Social Register members, are not "starving artists"; all are profiteering from the

Accordingly, summary judgment should have been granted to Owner, for at least the long overdue rents for 4-8 years. The failure to so apply the 1992 Loft Law Amendments works an unlawful seizure, constitutes a clear taking of private property without just compensation, and impairs basic lease contracts. The 1992 Amendments were supposedly passed to remove many unconstitutional features of prior law. If this Court permits Legislatures *carte blanche* nullification of all constitutional rights by the simple declarative use of the word "emergency", then the Constitution is rendered totally meaningless.

Furthermore, the retroactive application of the Rent Stablization Laws of 1974, *McKinneys Unconsol. Laws* §§8600, *et seq.* which imposes vast new financial and legal burdens upon owner, never contracted (or paid for) violates or negates virtually every substantive clause of the lease the owner agreed to (See App. "M"); if legislatures can do this by writing "emergency", then no property owner, or society is safe.

IV. THIS RETROACTIVE LEGISLATIVE GRANTING OF PROPERTY RIGHTS TO PERSONS WHO, BY DEFINITION, COMMITTED CRIMINAL ACTS BY ILLEGALLY RESIDING IN "LOFT' BUILDINGS, EITHER AS A REWARD FOR THEIR PAST CRIMINAL CONDUCT OR AS "PUNISHMENT" TO OWNER - IS AN UNCONSTITUTIONAL SEIZURE OF PETITIONER'S PROPERTY AND IMPAIRMENT OF CONTRACT.

The sole beneficiaries of the Loft Laws were persons illegally residing in non-residential buildings during the retroactively selected 1980/1981 period. The Loft Laws of June, 1982, abrogated virtually every provision of existing leases, and every single legislative change is of direct benefit to the tenant, and a burden upon the landlord. [11] Just a few:

Loft Laws,subletting and "selling" "their" lofts to strangers, in total violation of the lease, and enjoying large windfalls such as this million dollars in rent - the absence of which made, and makes it impossible for the building owner to comply with the stated objective of "legalizing" the building, in any event.

[11] This mandatory retroactive compliance with residential rules alone, retroactively subjects the building to a vast panoply of building laws, codes

(1) The fixed term of the lease is extended to an indefinite term, which has reached twelve (12) extra years already under the statutory scheme, and which is designed to be life-time or permanent. (*See*, MDL §§286-13); "Rent Stabilization Laws". *Supra;* (2) As here, M.D.L.§302 directly prohibits and confiscates the collection of all rent or use and occupancy owed and unpaid by Respondents through September, 1992; (3) vast new repair, services, expenditures and other financial and legal obligations and renovation requirements contrary to the express terms of the lease are imposed; (4) the rent is retroactively lowered; (5) the reasonable cost of living increases are abrogated. The Legislature had no constitutional authority to transfer virtually the entire bundle of property rights (especially rent payments) from the owner to the tenant retroactively, *North Shore Cycles, Inc. v. Yamaha Motor Corp.*, 919 F2d 1041 (5th Circuit, 1990) to grant long-term leaseholds totally abro-gating the contract between the parties and imposing crushing financial burdens upon the owner, in direct contravention of the explicit provisions in the lease. This total destruction of contractual expectations is clearly substantial impairment in violation of contract clause. If this retroactive legislation is constitutional, then all contracts are essentially being written with invisible ink, and not worth the paper upon which they are printed. [12]

V - NEITHER *SPRING REALTY CO. V. NEW YORK CITY LOFT BOARD* NOR *640 BROADWAY RENAISSANCE CO. V. CUOMO ET AL*, ARE CONTROLLING PRECEDENT HEREIN.

Spring Realty, supra, was premature and speculative, since there was no "designated" building under the Loft Laws; here is an actual case and controversy, <u>after</u> official "designation" by the Loft Board in 1988, which caused actual damage and bankruptcy. The Supreme Court properly declined to review *Spring Realty* for "want of a substantial federal question" because, the record clearly indicated, Loft

---

and statutes that relate solely to residential buildings and not to commercial buildings. See Appendix "U" for partial list.

[12] Also making impossible the so-called "legalization" of the building, including the huge expenses of removing and replacing all the illegal work done by tenants, with no permits or licensed contractors.

Laws had never been applied to those buildings; under Art. III, Sec. 1 of the Constitution, federal courts only have jurisdiction over actual cases and controversies. *Rizzo v. Goode*, 423 U.S. 362 (1976)[13]. Since *Spring Realty's* buildings were not "designated" by the Loft Board, and no actual damage or taking was proved, *Spring Realty* was wanting a substantial federal question; but the exact opposite is true here.

***640 Broadway v. Cuomo* is not a bar to this action.**

In 1990, there had been no holding by the New York Courts that, as here, Petitioner was permanently forfeiting 4-8 years of rent payments; the 1992 legislation sued under herein, - purported to grant Petitioner all procedural rights to collect any rents or use and occupancy due since 1980. However, the N.Y. Courts, in the instant action, failed and refused to appropriately apply the 1992 Amendments, thereby unconstitutionally confiscating Petitioner's 4 to 8 years of rent.[14]

V - THE RESPONDENTS "SPECIAL PERMIT" ARGUMENTS ARE PURE RED HERRINGS.

It is true that Petitioner voluntarily filed a special permit application to the City Planning Commission in 1982 - but this was before the passage of the Loft Laws on June 21,

[13] *Spring Realty* was a state declaratory judgment action, and plaintiffs merely "assumed" that they were covered; no proceedings had been commenced to "designate" such buildings. Thus, an advisory opinion was being requested. Furthermore, in *Spring Realty*, owners were not affirmatively required to obtain a discretionary zoning variance or "special permit". In *Spring Realty*, the City claimed no present showing of a taking, prematurity and conjecture, and that building owners were making "conclusory", "alarmist speculations" without support in the statute or in the record. Here, official "designation" as an "interim multiple dwelling" has occurred, a public document, clouding owner's fee title and requiring dedication of the building to purported "public" use. Immediately after such "Loft Board" designation (or prior), all "designated" tenants stopped paying rent or use and occupancy, claiming such rights under the Loft Laws, and Petitioner was rendered bankrupt because it could not collect any rent or use and occupancy.

[14] Furthermore, *640 Broadway Renaissance v. Cuomo* was an action under §1983 against the State for a declaratory judgment; here, the State is not a party and solely monetary damages are sought from the persons who used and occupied the building - what they contracted to pay - but did not.

1982, which drastically and fundamentally changed all the legal, financial and physical rules applicable thereto. The retroactive imposition of the Loft Laws made the "special permit" ruinous and inevitably bankrupting, as happened here. Under the Loft Laws, the "special permit" became a mandated expropriation by the Legislature. (See, App. "FF", 'GG' ,"HH"). It was the specific obligation of the tenant under the lease to do all required construction and all "code compliance work" (App. "M" & "T"), including legal wiring and plumbing. The Loft Laws retroactively changed all legal and financial burdens from the tenant to the landlord. Thus, the forced 1982 "special permit" became extortionate; and was made totally irrelevant by the 1987 amendments to Loft Laws; and no longer required, voluntary or desirable[15].

CONCLUSION

This Court should grant *certiorari* and, thereafter hold that the Loft Laws and amendments must be applied to permit collection of past and accrued rent and use and occupancy due; the 1992 Loft Law amendments were supposedly "remedial" in nature and must be constitutionally construed so as to avoid this extortionate rent confiscation. Otherwise an unconstitutional forfeiture of huge rent arrears results.If this legislation, which retroactively seizes and redistributes the fundamental rights of property ownership, as applied here, is constitutional, then there are no contracts, and there is no Constitution.

Dated: New York, N.Y
March 25, 1996

Respectfully submitted.
MARTIN R. FINE
Attorney for Petitioner
644 Broadway, NY, NY 10012

---

[15] With the Respondents refusal to permit access and other obstructionist tactics, it is ludicrous to fault Petitioner for not "legalizing" the building as a Class A multiple dwelling after 14 years since the Loft Law was passed; it has simply been financially, structurally, legally, and procedurally impossible for Petitioner to do so. The City Loft Board admitted in a letter to all Loft Owners dated Dec. 23, 1993, (App. "Y"), that only 27% of buildings had been "legalized" after eleven years. Furthermore, in September 1991, under duress and protest, Petitioner duly registered the building and was forced by the Loft Board to pay all the prior years "filing fees", including the filing fes for the years covered by the within action.

APPENDIX Q

Excerpt from Petitioner's Brief dated September 21, 1994 to NY Appellate Division

G. The 1992 Loft Law Amendments Must Be Given Retroative Effect in Order to Avoid an Unconstitutional Taking of Property.

In order to avoid an unconstitutional taking of property, the Loft Law, as amended, must be interpreted so as to remove the statutory impediment to rent collection retroactively, as well as prospectively, once the loft building has been registered and is in compliance with the Loft Law. A retroactive and permanent forfeiture of more than four (4) years of rent payments, by legislative fiat alone, would violate the New York State Constitution, Article 1, Sections 6 and 7, which provide respectively:

No person shall be deprived life, liberty or property without due process of law.

Private property shall not be taken for public use without just compensation.

Based upon the Court of Appeals' holding in Seawall Associates v. City of New York, 74 N.Y.2d 92, 544 N.Y.S.2d 542 (1989), the Loft Law, if interpreted by the courts to effect a permanent forfeiture of all rent due and owing to Renaissance for the period 1988 to 1992, would constitute both a regulatory taking and a physical taking of Renaissance's property and its fundamental right, as a property owner, to collect rent for the use and occupancy of its property.

In order to avoid an unconstitutional taking, this Court *must and should interpret the 1992* amendment to the Loft Law to mean that, once an owner has registered the building under the Loft Law, and has been deemed in compliance with the Loft Law, all rent owed should be collectible. This Court should construe the Loft Law so as to permit the owner to collect its rents due, without a forfeiture, as provided for in the lease agreements, or the value of the use and occupancy of the owner's real estate, as well as the value of the multitude of services required to be provided by the owner, including tax payments, fuel expenses, repairs and maintenance, mortgage payments and all other costs of operation.

As aptly noted by the Court of Appeals in Seawall:

> "Moreover, to constitute a physical taking, the occupation [of private property] need not be by the government itself, but may be by third parties under its authority (Loretto v. Teleiprompter Manhattan CATV Corp., supra, at 432, 433, n.9, 102 S.Ct.at 3174, 3175, n.9)..."

-37-

Although the Supreme Court has not passed on the specific issue of whether the loss of possessory interests, including the right to exclude, resulting from tenancies coerced by the government would constitute a per se physical taking, we believe that it would. Indeed, it is difficult to see how such forced occupancy of one's property could not do so. By any ordinary standard, such interference with an owner's rights to possession and exclusion is far more offensive and invasive than the easements in Kaiser Aetna or Nollan or the installation of CATV equipment in Lorettg. (citations omitted)

Even if Local Law 9 [the SRO law] were not held to effect a physical taking, it would still be fatally invalid as a regulatory taking. 'Suffice it to say that government regulation - by definition - involves the adjustment of rights for the public good. often this adjustment curtails some potential for the use or economic exploitation of private property' (Andrius v. Allard, 444 U.S. 51, 65, 100 S.Ct. 318, 326, 62 L.Ed. 210. But the constitutional guarantee against uncompensated takings is violated when the adjustment of rights for the public good becomes so disproportionate that it can be said that the governmental action is forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' (Armstroncf v. United State, supra, 364 U.S. at 49, 80 S.Ct. at 1569) . . . It is basic, however, that such a burden-shifting regulation of the use of private property will, without more, constitute a taking: (1) if it denies an owner economically viable use of property or (2) it does not substantially advance legitimate State interests. (citations omitted)

By contrast, Local Law No. 9 totally prohibits the sole use entirely permissible before the enactment of the law for which investment properties are purchased:commercial development. As a substitute, it decrees that the properties must be used for SRO housing and that the owners must be satisfied with the diminished financial returns from such use.

The Loft Law, with its coerced conversion of loft buildings to rent reulgatred residential buildings for "artists," cannot constitutionally be interpreted to impose a permanent

forfeiture of rent. The collection of rent is the most fundamental aspect of real estate ownership. The Legislature cannot, through retroactive "regulation," simply take away or forfeit that fundamental property right, for any length of time, through "regulatory" legislation without violating the New York State Constitution. In order to avoid such constitutional violation and permanent forfeiture of property rights, the Court should properly grant retroactive effect to the 1992 Loft Law amendments so as to permit an owner in compliance to recover all rents due and owing.

RIDER ANNEXED TO AND MADE PART OF INTERIM MULTIPLE DWELLING REGISTRATION APPLICTION

THIS INTERIM MULTIPLE DWELLING REGISTRATION APPLICATION IS BEING FILED UNDER PROTEST AND UNDER DURESS.

Article 7C of the Multiple Dwelling Law, and Section 284(a) of the Multiple Dwelling Law, as it purports to apply to these promises, is unconstitutional and unlawful for numerous reasons including, but not limited to the following:

(1) Article 7C of the Multiple Dwelling Law constitutes an unconstitutional taking of applicant's property without due process of law.

(2) Article 7C of the Multiple Dwelling Law constitutes an impairment of the obligation of contracts of Article 1, Section 10 of the United States Constitution, and Title 42, United States Code, Sec. 1983.

(3) Article 7C of the Multiple Dwelling Law constitutes an unlawful and unconstitutional delegation of legislative authority in violation of the New York State Constitution and the New York City Charter and Administrative Code to a group of private individuals purporting to constitute the "New York City Loft Board".

(4) Article 7C of the Multiple Dwelling Law as it purports to apply to these premises and the Interim Multiple Dwelling Application promulgated by the "New York City Loft Board" constitutes a invasion of privacy and requires information to be supplied by the applicant which constitutes an invasion of privacy and a taking of property without due process of law and without compensation therefor in violation of the New York State and United States Constitutions.

(5) Section 1105 of the New York State Charter and the so-called "Mayor's Executive Order 66" and the purported rules and regulations relating to registration of interim multiple dwellings purportedly promulgated by the New York City Loft Board, Dated November 30, 1982, are unconstitutional, illegal and an unlawful delegation of legislative authority and together constitute an unconstitutional taking of applicant's property without due process of law and without compensation therefore in violation of the New York State and United States Constitutions.

THEREFORE, THIS APPLICATION IS FILED BY 640 BROADWAY RENAISSANCE CO., UNDER PROTEST AND UNDER DURESS, AND DOES NOT CONSTITUTE A WAIVER OF ANY LEGAL OR CONSTITUTIONAL RIGHTS OF APPLICANT.

APPENDIX "5"

Exhibit V - **Affidavit Of** Hyman Schermer **Sworn** To April 15, 1993 (1302-1316)

SUPREME COURT OF THE STATE OF NEW YORK : COUNTY OF NEW YORK

640 BROADWAY RENAISSANCE COMPANY,
Debtor-in-Possession

Plaintiff,

-against-

NANCY HOFFMAN, a/k/a NANCY GEISMAN a/k/a NANCY HOFFMAN GEISMAN,

Defendants

Index No. 29602/92

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION

TO BE CONSOLIDATED WITH INDEX NUMBERS:

23830/92
23831/92
23832/92
23833/92
23834/92
23835/92
23836/92
23838/92
23839/92
23840/92
23841/92
23842/92
23843/92
23844/92
23845/92

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HYMAN SCHERMER, being duly sworn, deposes and says:

1. I am a licensed real estate broker and real estate salesman for over 20 years. I make this affidavit in support of the Plaintiff's motions in the above matters, (all 16 cases) with the 15 other tenants (or former tenants) at the premises 640 Broadway, New York, New York.

2. I was the broker involved in the purchase of this building in 1978/79 by 640 Broadway Renaissance Company, and I inspected the building many times in 1978/79, in the process of selling it. At that time, it was a

virtually abandoned and empty broken-down manufacturing building; in the past twelve

1

years or so, 640 Broadway Renaissance Company has virtually completely renovated this building, replacing all the major systems, including, but not limited to: (1) installing a new boiler in 1988 (See Exhibits) (after the Loft Board decision) ; (2) redoing the elevator (see contracts) , lobby, hallways and staircases (see photos), the roof and main plumbing and electrical systems, and all public areas.

3. It has also installed new mailboxes, a new intercom system, and new front doors. See photos and copy of contract.

4. Contrary to the claims of the holdover tenants in this building, they are working and living in one of the finest and best loft buildings - at artificially depressed and subsidized rents.

5. The net effect of their claims, if granted, would be to have the tenants steal more than a million dollars in back rent, (ranging from five to 8 years) - based solely upon their own fraudulent and illegal conduct.

6. The loft laws were not meant to, and do not cause any forfeiture of rent - while the tenants were willfully using and occupying the premises, as holdover tenants, they must pay for their use and occupancy; the entire real estate system fundamental to our society and economy is based upon that simple fact. Without the assurance of rent payments, buildings and cities cannot be built, financed or maintained and it would be against public policy to permit these tenants to just rip-off a million dollars of back rent - which will reduce the value of the

2

building for real estate purposes, and assist these confessed illegal occupiers and reward them for their misdemeanors. See, Multiple Dwelling Law § 304.1.)

7. Furthermore, to grant the tenants even further ill-gotten gains will greatly reduce the value of all real estate in New York State, and discourage investment in New York across the board as still further evidence - if the statute is so interpreted that the New York State constitutional guarantee of protection of private property is a meaningless phrase.

8. The plaintiff has invested hundreds of thousands of dollars in rehabilitating and reconstructing this virtually abandoned building, and totally renovated it and it is now fully rented, with a waiting list!! It has become a highly desirable building, and is considered one of the finest lost buildings in the City. it was the first "Empire State Building" (see attached), with spacious lofts of approximately 2,000 sq.ft each (larger than the average single family home) with beautiful large windows on three sides of the building, and beautiful architectural details and high ceilings; I would be proud to rent these lofts to anybody - and there are no visible "hazardous" or "unsafe" conditions in the building (those are utter and self-serving lies from the tenants, designed to bolster their claims for not paying many years' rent, solely because of their own willful breach of the state's criminal code and the city's zoning laws.

9. I recently visited and inspected the building (in the

winter of 1992) and carefully examined Loft Unit 7E, which had been recently vacated by one defendant, Nancy Hoffman. THE LOFT WAS ABSOLUTELY BEAUTIFUL, LUXURIOUS AND HIGHLY DESIRABLE. In my professional opinion, it had a rental value of at least $2,300 per month, and would be exceedingly easy to rent at that price. (I have been advised that it is already rented)

10. The photographs submitted as Exhibits demonstrate how nice, clean and well maintained this loft, and the building are, and how desirable, and not "hazardous". (That is attempted revisionist history by the tenants]

11. I personally tested all the plumbing fixtures in the Loft 7E kitchen and bathroom, and they all worked properly; the water pressure and the elevators were running fine, and there were no hazardous conditions of any kind visible in the lobby, stairwells, or any public or private areas. I would be proud to show the Court this building - and cordially invite Special Term to do so - because the tenants are plainly lying - for pure greed - in order to reap an unconscionable and unjust enrichment of pocketing the money for use and occupancy that rightfully belongs to the owners of the building.

/s/
HYMAN SCHERMER

SWORN To before me this
of April, 1993.

/s/
Notary Public

APPENDIX T

Excerpts of lease - Additional clauses - all abrogated by "Loft Laws".

3. Alterations: Tenant shall make no changes in or to the demised premises of any nature without Landlord's prior written consent. . . .All fixtures and all paneling, partitions, railings and like installations, installed in the premises at any time, either by Tenant or by Landlord in Tenant's behalf, shall, upon installation, become the property of Landlord and shall remain upon and be surrendered with the demised premises unless Landlord, by notice to Tenant no later than twenty days prior to the date fixed as the termination of this lease, elects to relinquish Landlord's right thereto and to have them removed by Tenant, in which event, the same shall be removed from the premises by Tenant prior to the expiration of the lease, at Tenant's expense. Nothing in this article shall be construed to give Landlord title to or to prevent Tenant's removal of trade fixtures, moveable office furniture and equipment, but upon removal of any such from the premises or upon removal of other installations as may be required by Landlord, Tenant shall immediately and at its expense, repair and restore the premises to the condition existing prior to installation and repair any damage to the demised premises or the building due to such removal. . . Tenant shall, before making any alterations, additions, installations or improvements, at its expense, obtain all permits, approvals and certificates required by any governmental or quasi-governmental bodies and (upon completion) certificates of final approval thereof and shall deliver promptly duplicates of all such permits, approvals and certificates to Landlord and Tenant agrees to carry and will cause Tenant's contractors and sub-contractors to carry such workman's compensation, general liability, personal and property damage insurance as Landlord may require. . .

4. Repairs: . . . (See Appendix "M") If the demised premises be or become infested with vermin, Tenant shall at Tenant's

expense, cause the same to be exterminated from time to time to the satisfaction of Landlord. . .

6. . . .Except as provided in Article 29 hereof, nothing herein shall require Tenant to make structural repairs or alterations unless Tenant has by its manner of use of the demised premises or method of operation therein, violated any such laws, ordinances, orders, rules, regulations or requirements with respect thereto. Tenant may, after securing Landlord to Landlord's satisfaction against all damages, interest, penalties and expenses, including, but not limited to, reasonable attorneys fees, by cash deposit or by surety bond in an amount and in a company satisfactory to Landlord, contest and appeal any such laws, ordinances, orders, rules, regulations or requirements provided same is done with all reasonable promptness and provided such appeal shall not subject Landlord to prosecution for a criminal offense or constitute a default under any lease or mortgage under which Landlord may be obligated, or cause the demised premises or any part thereof to be condemned or vacated. Tenant shall not do or permit any act or thing to be done in or to the demised premises which is contrary to law, or which will invalidate or be in conflict with public liability, fire or other policies of insurance at any time carried by or for the benefit of Landlord with respect to the demised premises or the building of which the demised premises form a part, or which shall or might subject Landlord to any liability or responsibility to any person or for property damage, nor shall Tenant keep anything in the demised premises except as now or hereafter permitted by the Fire Department, Board of Fire Underwriters, Fire Insurance Rating Organization or other authority having jurisdiction, and then only in such manner and such quantity so as not to increase the rate for fir insurance applicable to the building, nor use the premises in a manner which will increase the insurance rate for the building or any property located therein over that in effect prior to the commencement of Tenant's occupancy. Tenant shall pay all costs, expenses, fines, penalties or damages, which may be imposed upon Landlord by reason of Tenant's failure to comply with the provisions of this article and if by

reason of such failure the fire insurance rate shall, at the beginning of this lease or at any time thereafter, be higher than it otherwise would be, then Tenant shall reimburse Landlord, as additional rent hereunder, for that portion of all fire insurance premiums thereafter paid by Landlord which shall have been charged because of such failure by Tenant, and shall make such reimbursement upon the first day of the month following each outlay by Landlord. In any action or proceeding wherein Landlord and Tenant are parties a schedule or "make-up" of rate for the building or demised premises issued by the New York Fire Insurance Exchange, or other body making fire insurance rates applicable to said premises shall be conclusive evidence of the facts therein stated and of the several items and charges in the fire insurance rate then applicable to said premises. . .

11. Assignment: Tenant, for itself, its heirs, distributees, executors, administrators, legal representatives, successors and assigns, expressly covenants that it shall not assign, mortgage or encumber this agreement, nor underlet, or suffer or permit the demised premises or any part thereof to be used by others, without the prior written consent of Landlord in each instance. If this lease be assigned, or if the demised premises or any part thereof be underlet or occupied by anybody other than Tenant, Landlord may, after default by Tenant, collect rent from the assignee, under-tenant or occupant, and apply the net amount collected to the rent herein reserved, but no such assignment, underletting, occupancy or collection shall be deemed a waiver of this covenant, or the acceptance of the assignee, under-tenant or occupant as tenant, or a release of Tenant from the further performance by Tenant of covenants on the part of Tenant herein contained. The consent by Landlord to an assignment or underletting shall not in any wise be construed to relieve Tenant from obtaining the express consent in writing of Landlord to any further assignment or underletting.

13. Access to Premises: Landlord or Landlord's agents shall have the right (but shall not be obligated) to enter the

demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Landlord may deem necessary and reasonable desirable to the demised premises or to any other portion of the building or which Landlord may elect to perform following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under this lease, or for the purpose of complying with laws, regulations and other directions of governmental authorities.

18. Remedies of Landlord and Waiver of Redemption: In case of any such default, re-entry, expiration and/or dispossess by summary proceedings or otherwise, (a) the rent shall be come due thereupon and be paid up to the time of such re-entry, dispossess and/or expiration, together with such expenses as Landlord may incur for legal expenses, attorneys' fees, brokerage, and/or putting the demised premises in good order, or for preparing the same for re-rental; (b) Landlord may re-let the premises or any part or parts thereof, either in the name of Landlord or otherwise, for a term or terms, which may at Landlord's option be less than or exceed the period which would otherwise have constituted the balance of the term of this lease and may grant concessions or free rent or charge a higher rental than that in this lease, and/or (c) Tenant or the legal representatives of Tenant shall also pay Landlord as liquidated damages for the failure of Tenant to observe and perform said Tenant's covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease.

19. Fees and Expenses: If tenant shall default in the observance or performance of any term or covenant on tenant's part to be observed or performed under or by virtue of any of the terms or provisions in any article of this lease, then, unless otherwise provided elsewhere in this lease, landlord may immediately or at any time thereafter and without notice perform the obligation of tenant thereunder, and if landlord, in connection therewith or in connection with any default by tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to attorney's fees, in instituting, prosecuting or defending any action or proceeding, such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by tenant to landlord within five (5) days of rendition of any bill or statement to tenant therefor, and if tenant's lease term shall have expired at the time of making of such expenditures or incurring of such obligations, such sums shall be recoverable by landlord as damages. • • •

20. No Representations by Landlord: Neither Landlord nor Landlord's agents have made any representations or promises with respect to the physical condition of the building, the land upon which it is erected or the demised premises, the rents, leases, expenses of operation or any other matter or thing affecting or related to the premises except as herein expressly set forth and no rights, easements or licenses are acquired by Tenant by implication or otherwise except as expressly set forth in the provisions of this lease. Tenant has inspected the building and the demised premises and is thoroughly acquainted with their condition, and agrees to take the same "as is" and acknowledges that the taking of possession of the demised premises by Tenant shall be conclusive evidence that the said premises and the building of which the same form a part were in good and satisfactory condition at the time such possession was so taken, except as to latent defects.

All

understanding and agreements heretofore made between the parties hereto are merged in this contract, which alone fully and completely expresses the agreement between Landlord and Tenant and any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect as abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought.

21. End of Term: Upon the expiration or other termination of the term of this lease, Tenant shall quit and surrender to Landlord the demised premises, broom clean, in good order and condition, ordinary wear excepted, and Tenant shall remove all its property. Tenant's obligation to observe or perform this covenant shall survive the expiration or other termination of this lease. If the last day of the term of this lease or any renewal thereof, falls on Sunday, this lease shall expire at noon on the preceding Saturday unless it be a legal holiday in which case it shall expire at noon on the preceding business day.

24. No Waiver: The failure of Landlord to seek redress for violation of, or to insist upon the strict performance of any covenant or condition of this lease or of any of the Rules or Regulations set forth or hereafter adopted by Landlord, shall not prevent a subsequent act which would have originally constituted a violation from having all the force and effect of an original violation. The receipt by Landlord of rent with knowledge of the breach of any covenant of this lease shall not be deemed a waiver of such breach and no provision of this lease shall be deemed a waiver of such breach and no provision of this lease shall be deemed to have been waived by Landlord unless such waiver be in writing signed by Landlord.

30. Elevators, Heat, Cleaning: As long as Tenant is not in default under any of the covenants of this lease Landlord shall ***(b) furnish heat to the demised premises, when and as required by law, on business days from 8 a.m. to 6 p.m. and on Saturdays from 8 a.m. to 1 p.m.; (c) at Landlord's expense cause to be kept clean the public halls and public portions of the building, which are used in common by all tenants. Tenant shall at Tenant's expense, keep the demised premises clean and in order, to the satisfaction of Landlord, and for that purpose shall employ the person or persons, or corporation approved by Landlord. Tenant shall pay to Landlord the cost of removal of any of Tenant's refuse and rubbish from the building. Bills for the same shall be rendered by Landlord to Tenant at such time as Landlord may elect and shall be due and payable when rendered, and the amount of such bills shall be deemed to be, and be paid as, additional rent. Tenant shall, however, have the option of independently contracting for the removal of such rubbish and refuse in the event that Tenant does not wish to have same done by employees of Landlord.

38. Glass: Tenant shall replace, at the expense of Tenant, any and all plate and other glass damaged or broken from any cause whatsoever in and about the demised premises. Tenant shall insure, and keep insured, at Tenant's expense, all plate and other glass in the demised premises for and in the name of Landlord. Bills for the premiums therefor shall be rendered by Landlord to Tenant at such times as Landlord may elect, and shall be due from, and payable by, Tenant when rendered, and the amount thereof shall be deemed to be, and be paid as, additional rent.

39. Permits: Tenant covenants that Tenant will not use or suffer or permit any person to use the demised premises for any unlawful purpose and to obtain and maintain at Tenant's sole cost and expense all licenses and permits from any and all governmental authorities having jurisdiction of the demised premises which may be necessary for the conduct of Tenant's business therein. Tenant further covenants to comply with applicable laws, resolutions, codes, rules and regulations of any department, bureau, agency or any governmental authority having jurisdiction over the operation, occupancy, maintenance and use of the demised premises for the purposes set forth herein. Tenant will indemnify and save Landlord harmless from and against any claims, penalties, loss, damage or expense imposed by reason of a violation of any applicable law or the rules and regulations of governmental authorities having jurisdiction thereof related to Tenant's use and occupancy.

40. Indemnity: Tenant agrees to indemnify and save harmless Landlord against and from all claims by or on behalf of any person or persons, firm or firms, corporation or corporations, arising from any work or thing whatsoever done by or on behalf of Tenant, in or about the demised premises, and will further indemnify and save Landlord harmless against and from and all claims arising from any breach or default on the part of Tenant in the performance of any

covenant or agreement on the part of tenant to be performed, pursuant to the terms of this lease, or arising from any act or negligence of Tenant, or any of its agents, contractors, servants, employees or licensees, and from and against all costs, reasonable counsel fees, expenses and liabilities incurred in or about any such claim or action or proceeding brought thereon; and in case any action or proceeding be brought against Landlord by reason of any such claim, Tenant, upon notice from Landlord, covenants to resist or defend, at Tenant's expense, such action or proceeding by counsel reasonably satisfactory to Landlord.

54. COST OF LIVING ADJUSTMENT: Recognizing the length of the term of the lease granted Tenant and inflationary tendencies in recent years, Tenant agrees that in the event the "Consumer Price Index" published by the Bureau of Labor Statistics of the U.S. Department of Labor (1967 = 100) for New York/Northeastern New Jersey area for "All items" (hereinafter called the "Price Index"), or successor or substitute index appropriately adjusted, reflects an increase after the commencement date of this lease in the cost of living over and above such costs as reflected by such Price Index as it exists for the month of November 1980 (hereinafter called the "Base Month") the fixed rent payable hereunder shall be increased in accordance with the following:

(a) There shall be no adjustment until the month of December 1981. On the first day of December 1981 and each December 1st thereafter throughout the term, there shall be an adjustment in the amount of said fixed rent based on the difference between the Price Index as it exists on the Base Month and the Price Index for the calendar month of the date of such adjustment.

(b) The percentage increase thus determined shall be multiplied by the annual fixed rent payable hereunder and this sum shall represent the annual increase in such rent for the twelve (12) months next ensuing, commencing with such December adjustment month, provided that no such adjustment shall result in a decrease in the fixed rent below the fixed rent payable by Tenant under the terms of this lease. • • •

55. Maintenance: Tenant shall maintain the premises in a proper manner and in a general state of cleanliness. Tenant shall, at Tenant's sole cost and expense, arrange for the removal of and shall cause to be removed all refuse and rubbish from the demised premises in a manner which shall at all times comply with (a) such rules and regulations as, in the judgment of the Landlord, are necessary or desirable for the proper operation of the Building and (b) all applicable laws, orders, ordinances, rules and regulations of the Sanitation Department and Board of Health of New York City and of any other governmental authority having jurisdiction over the demised premises or the operations conducted therein.

56. No Representations: Tenant acknowledges that Tenant is fully familiar with the condition of the Building and the demised premises. Tenant therefore agrees to accept the demised premises "as is" and in whatever state or condition they may be in at the commencement of the term of this lease. Landlord shall not be obligated to do any work or make any repairs, alterations, or improvements in or to the demised premises, except as specifically set forth in this lease.

62. Tenant shall supply and install all fixtures by Tenant at Tenant's own cost and expense. Tenant also recognizes and agrees that the Tenant must obtain the written consent of the landlord for all alteration work to be done on the premises in advance for all such work being done. Tenant further recognizes and agrees that because this is a fireproof building, that all partition work must be done with metal studs and with 5/8" sheet rock on both sides. Tenant further recognizes, understands and covenants that the use of any wooden studs or partitions in the premises will be both a violation of the lease and a violation of the applicable building laws and codes and tenant covenants and agrees not to use any non-fireproof materials in any such construction work.

63. Tenant also recognizes and understands that all plumbing work must be done or approved by a licensed plumber and will submit all plumbing plan to the landlord for

landlord's prior written approval before such work is commenced.

64. Tenant recognizes, agrees and covenants that all waste and vent lines must be made or properly sized cast iron or galvanized iron pipe and that the use of plastic pipe is not legal in new York City. Tenant further reconizes and agrees that if copper tubing is used, said copper tubing must be rigid copper tubing and that the use of flexible copper tubing is not lawful or permitted and will also be a violation of the lease.

65. Tenant recognizes, agrees and covenants that all electrical work must be done and filed by a New York City licensed electrician. Tenant shall supply copies of all electrical installation drawings to the Landlord prior to such installation.

66. Tenant shall require all of its contractors plumbers and electricians to supply to the Landlord a certificate of insurance naming the Landlord as an additional insured prior to the commencement of any work by said contractor, plumber or electrician.

LOFT BOARD

Rules and Regulations

Pursuant to Section 1105 of the New York City Charter, Article 7-C of the Multiple Dwelling Law, and Mayor's Executive Order No. 66, the New York City Loft Board hereby promulgates the following Rules and Regulations Relating to Registration of Interim Multiple Dwellings and Minimum Housing Standards for Interim Multiple Dwellings.

Section 1 *Definitions*

A. *Landlord* -

As used in these regulations, the term "landlord" shall mean the owner of an interim multiple dwelling, the lessee of a whole building part of which is an interim multiple dwelling, or the agent or other person having control of such a dwelling.

B. *Residential Occupant* -

As used in these regulations, the term "residential occupant" shall mean an occupant of an interim multiple dwelling eligible for protection under Article 7-C of the New York State Multiple Dwelling Law.

Section 2 *Registration of Interim Multiple Dwellings*

A. The following "Information and Instruction to Owners, Lessees and Agents of Interim Multiple Dwellings" constitute the procedures for registration of Interim Multiple Dwellings pursuant to Section 284(2) of Article 7-C of the New York State Multiple Dwelling Law. Applications for registration shall be in a form promulgated by the Loft Board.

New York City Loft Board
116 Nassau Street
New York, NY 10038
566-1438

INFORMATION AND INSTRUCTIONS TO OWNERS, LESSEES AND AGENTS OF INTERIM MULTIPLE DWELLINGS

A new state law, Article 7-C of the Multiple Dwelling Law, effective June 21, 1982, required the establishment of a New York City Loft Board to foresee the legalization of residential lofts. The law defines as an "interim multiple dwelling" a building or a portion thereof in an area which allows residential use, which: (1) at any time was occupied for manufacturing, commercial or warehouse purposes; (2) on December first, nineteen hundred eighty-one was occupied for residential purposes since April first, nineteen hundred eighty as the residence or home of any three or more families living independently of one another; and (3) lacks a certificate of compliance or occupancy pursuant to section three hundred one of the Multiple Dwelling Law. In addition, in an interim multiple dwelling residential occupants in units first occupied after April 1, 1980 and prior to April 1, 1981 shall be qualified for protection pursuant to Article 7-C. A reduction in the number of occupied residential units in a building after December 1, 1981 shall not eliminate the protections of Article 7-C for any remaining residential occupants qualified for such protections.

Section 284(2) requires the registration of all interim multiple dwellings. These instructions are being sent to, or are available to, landlords of buildings which are believed to be interim multiple dwellings. (See 4. below.) If additional forms are required for other buildings, or if there are any questions, contact the above office.

INSTRUCTIONS - INTERIM MULTIPLE DWELLING REGISTRATION APPLICATION - PART A

1. PRINT, using black ink only, all information in completing the registration form. Detach this Information and Instruction sheet and RETURN copies of the form, when completed, to:

"I.M.D." REGISTRATION
NEW YORK CITY LOFT BOARD
116 NASSAU STREET
NEW YORK, NEW YORK 10038

Registration forms must be filed for all Interim Multiple Dwellings by January 31, 1983 to avoid payment of an initial registration fee.

* * *

8. *APPLICATIONS MUST BE COMPLETED IN ITS ENTIRETY. LEGIBLE COPIES OF THE CURRENT LEASE OR, WHERE THERE IS NO CURRENT LEASE, THE MOST RECENT LEASE AGREEMENT (INCLUDING ALL EXECUTED RIDERS, AMENDMENTS, MODIFICATIONS AND EXTENSIONS) FOR ALL RESIDENTIALLY OCCUPIED UNITS MUST BE ATTACHED REGARDLESS OF THE COMMERCIAL, RESIDENTIAL, OR MANUFACTURING NATURE OF THE LEASE. IF NO LEASE EXISTS OR EXISTED, ATTACH A SIGNED STATEMENT OUTLINING THE MOST RECENT RENTAL AGREEMENT.*

* * *

AN APPLICATION WILL NOT BE ACCEPTED, AND AN IMD REGISTRATION NUMBER WILL NOT BE ASSIGNED, UNLESS ALL QUESTIONS ARE ANSWERED IN FULL AND ALL REQUIRED LEASES ARE

ATTACHED. If a particular question or piece of information is inapplicable or not available enter NOT APPLICABLE and attach a signed statement explaining the reasons. The content of an application will be reviewed prior to acceptance.

* * *

If the owner, lessee, agent or other person is a corporation, other than a corporation listed as exempt from the provisions of the Multiple Dwelling Law § 325, the names, business and residence addresses and phone numbers of its officers must be listed on the form.

Other officers, including treasurer or chief fiscal officer, and stockholders who own or control at least 10% of the corporation's stock must be listed on a separate attachment.

If the owner, lessee, agent or other person is other than an individual or a corporation, the names, business and residential addresses and phone numbers for each general partner or participant in a partnership or joint venture must be listed on a separate attachment.

AT LEAST ONE OF THE PHONE NUMBERS ENTERED ON THE FORM MUST BE A CONFIDENTIAL TELEPHONE NUMBER WHERE A RESPONSIBLE PARTY CAN REASONABLY BE EXPECTED TO BE REACHED AT ALL TIMES FOR EMERGENCIES. SUCH NUMBER(S) MUST BE WITHIN 50 MILES RADIUS OF NEW YORK CITY LIMITS AND MUST BE INDICATED ON A SEPARATE SIGNED SHEET OF PAPER AND ATTACHED TO THE APPLICATION.

11. All owners, lessees of whole buildings, and agents or other persons having control of the premises who file for I.M.D. Registration Numbers agree to provide the minimum housing maintenance standards established or to be

established by the Loft Board to all residentially occupied units for as long as the I.M.D. Registration Number is valid.

* * *

B. Landlords of interim multiple dwellings for which an IMD Registration Number has been issued, shall be deemed to be compliance with the registration provisions of Article 7-C and shall be entitled to claim rents becoming due after the date of issuance of the IMD Registration Number, in summary proceedings, pursuant to Section 285(1) of Article 7-C of the Multiple Dwelling Law.

Finding that there are a significant number of ongoing disputes between landlords and residential occupants in loft dwellings over payment of past due rents and that Article 7-C did not intend to authorize landlords to recover past due rents from residents occupying premises which may not qualify for coverage under Article 7-C, the Loft Board believes that landlords' right to recover for past due rents pursuant to Section 285(1) of the Multiple Dwelling Law should be stayed until the question of coverage of an IMD has been resolved.

Landlords who waive their right to contest coverage by executing a written waiver in a form acceptable to the Loft Board or whose coverage dispute has been resolved by a determination that the premises in question are covered by Article 7-C and who have met the requirements of subdivision 2(A) of this rule shall be deemed in full compliance with the registration provisions of Article 7-C in order to claim past due rent payable from residential occupants pursuant to Section 285(1) of the Multiple Dwelling Law.

* * *

Section 284(2) of Article 7-C requires owners, lessees of whole buildings and agents of interim multiple dwellings (i.e. applicable non-residential loft buildings) to file with the Loft

Board a notice in conformity with Section 325 of the Multiple Dwelling Law and with rules and regulations promulgated by the Loft Board. This Rule, which established filing procedures conforms to MDL Section 325 while making additions in several important respects.

* * *

Second, owners, lessees and agents are required to submit the current, or most recent lease for each residentially occupied units along with IMD Registration Applications. All identifying information on these leases will be kept confidential. Third, those who file for IMD registration will agree to provide the minimum housing maintenance standards established by the Loft Board to all residentially occupied units.

Article 7-C, Section 282 authorizes the Loft Board to establish, after public hearings, minimum housing maintenance standards in interim multiple dwellings. The Loft Board held public hearings concerning minimum housing maintenance standards on October 27, 1982 and November 10, 1982. Landlords, tenants and concerned citizens testified.

I do hereby certify that good cause exists for waiving the requirement that thirty days shall first elapse after publication in THE CITY RECORD and that the foregoing Regulations shall become effective on the date of publication.

Dated: January 27, 1983
Filed with the City Clerk: January 27, 1983

/s/
CARL B. WEISBROD
Chairman

APPENDIX W

VILLAGE VOICE
February 13, 1996
P. 99

LOFTS FOR RENT 6180

Noho Bdwy-Studio for Sale:
Fixture Fee. Lifetime lse $640./mo
950sqft finished. Darkrm, live/work.
$35k cash/a deal!
(212)873-1581

LOFT BOARD

Notice of Promulgation of and Opportunity to Comment on New Rules Relating to Registration Of Interim Multiple Dwellings and Minimum Housing Maintenance Standards for Interim Multiple Dwellings Addressing Conditions Dangerous to Human Life and Safety

Pursuant to Section 1105 of the New York City Charter and by virtue of the authority vested in me as Chairman of the New York City Loft Board by Mayor's Executive Order No. 66 the following Rules Relating to Registration of Interim Multiple Dwellings and Minimum Housing Maintenance Standards for Interim Multiple Dwellings Addressing Conditions Dangerous to Human Life and Safety are hereby promulgated to be immediately effective.

NOTICE IS HEREBY GIVEN,
PURSUANT TO SUBDIVISION E OF
SECTION 1105 OF THE CITY CHARTER, THAT interested persons may comment in writing on the following Rules, which are effective immediately. Written comment regarding the Rules may be submitted to the undersigned, addressed to him at his office at 116 Nassau Street, New York, NY 10038 not later than January 5, 1983. Comments will be duly considered prior to the promulgation of permanent regulations on this matter.

Section 1 *Definitions*

A. *Landlord* - As used in these emergency regulations, the term "landlord" shall mean the owner of an interim multiple dwelling, the lessee of a whole building part of

which is an interim multiple dwelling, or the agent or other person having control of such a dwelling.

B. *Residential Occupant* - As used in these emergency regulations, the term "residential occupant" shall mean an occupant of an interim multiple dwelling qualified for protection under Article 7-C of the New York State Multiple Dwelling Law.

Section 2 *Registration of Interim Multiple Dwellings*

A. The following "Information and Instruction to Owners, Lessees and Agents of Presumptive Interim Multiple Dwellings" and "Interim Multiple Dwelling Registration Application - Part "A" constitute the procedures for registration of Interim Multiple Dwellings pursuant to Section 284(2) of Article 7-C of the New York State Multiple Dwelling Law:
(See separate Form and Instructions)

* * *

Section 3 *Minimum Housing Maintenance Standards For Interim Multiple Dwellings*

A. Landlords of interim multiple dwellings shall provide the following minimum housing maintenance services to residential occupants qualified for the protection of Article 7-C of the Multiple Dwelling Law:

1. *Water Supply and Drainage* - . . .

2. *Heat* - . . .

* * *

E. It is the objective of the Loft Board that residential occupants receive heat seven days a week. The Board will

mandate such services, through additional and expanded rules and regulations, as buildings move toward legalization.

3. *Hot Water* - . . .

4. *Electricity* - . . .

5. *Gas* - . . .

6. *Smoke Detectors* - . . .

7. *Public Lighting* - . . .

8. *Entrance Door Security* - . . .

9. *Elevator Service* - . . .

* * *

EXPLANATION

In June 1982 a new Article 7-C of the Multiple Dwelling Law was enacted. Article 7-C provides a framework whereby most of the City's living lofts will be brought up to minimum health and safety standards as well as brought under a system of rent regulation and minimum housing maintenance standards. Article 7-C required the Mayor to appoint a Loft Board to oversee this process. The Mayor established the Loft Board, pursuant to Executive Order No. 66, on September 30, 1982. Section 284(2) of Article 7-C requires owners, lessees of whole buildings and agents of interim multiple (i.e. applicable non-residential loft buildings) to file with the Loft Board a notice in conformity with Section 325 of the Multiple Dwelling Law and with rules and regulations promulgated by the Loft Board. This Rule, which establishes an emergency filing procedure and application, conforms to MDL Section 325 while making additions in several important respects. It permits owners, lessees and agents to file with the Loft Board without

waiving their rights to contest coverage before the Loft Board. Those wishing to contest coverage, however, must do so by letter within 30 days of the issuance of the IMD registration number and so inform their occupants. Second, owners, lessees and agents are required to submit the current, or more recent lease for each residentially occupied unit along with IMD Registration Applications. All identifying information on these leases will be kept confidential. Third, those who file for IMD registration will agree to provide the minimum housing maintenance standards established by the Loft Board to all residentially occupied units.

Article 7-C, Section 282 authorizes the Loft Board to establish, after public hearings, minimum housing maintenance standards in interim multiple dwellings. The Loft Board held public hearings concerning minimum housing maintenance standards on October 27, 1982 and November 10, 1982. Landlords, tenants and concerned citizens testified. The failure to provide and maintain the standards regarding water, utilities, hot water, heat and other services required pursuant to this Rule constitute a condition dangerous to human life and safety.

A procedure for landlords or interim multiple dwellings to file with the Loft Board is necessary so that the Board, and other City agencies, may determine which buildings are subject to Article 7-C of the Multiple Dwelling Law and which residential occupants are subject to the protections of said Article 7-C including the housing maintenance standards required by this Rule.

8. This application must be completed in its entirety. Legible copies of the current lease or, where there is no current lease, the most recent lease agreement (including all executed riders, amendments, modifications and extensions) for all residentially occupied units must be attached regardless of the commercial, residential, or manufacturing nature of the lease. All personal and confidential information on leases will not be available under the Freedom of Information Act. The application will not be accepted, and a registration number will NOT be assigned, unless ALL questions are answered in full and all required leases are attached. If a particular question or piece of information is inapplicable, enter NOT APPLICABLE. The contest of the application will be reviewed prior to acceptance.

* * *

11. All owners, lessees of whole buildings, and agents or other persons having control of the premises who file for I.M.D. Registration Numbers agree to provide the minimum housing maintenance standards established or to be established by the Loft Board to all residentially occupied units for as long as the I.M.D. Registration Number is valid, provided however, that an I.M.D. Registration Number shall not be deemed invalid solely if a residential occupant shall withhold the payment of any rent then due.

* * *

13. An identification sign containing the building, address, the interim dwelling registration number assigned by the Loft Board for the purpose of identifying the building and the owner and managing agent shall be posted in every interim multiple dwelling within five (5) business days after the issuance of the I.M.D. Registration Number. The manner and location of the sign must comply with rules prescribed by the

Article 7-C, Section 282 authorizes the Loft Board to establish, after public hearings, minimum housing maintenance standards in interim multiple dwellings. The Loft Board held public hearings concerning minimum housing maintenance standards on October 27, 1982 and November 10, 1982. Landlords, tenants and concerned citizens testified. The failure to provide and maintain the standards regarding water, utilities, hot water, heat and other services required pursuant to this Rule constitute a condition dangerous to human life and safety.

A procedure for landlords or interim multiple dwellings to file with the Loft Board is necessary so that the Board, and other City agencies, may determine which buildings are subject to Article 7-C of the Multiple Dwelling Law and which residential occupants are subject to the protections of said Article 7-C including the housing maintenance standards required by this Rule.

FINDING AND STATEMENT

As Chairman of the New York City Loft Board, I find that the imminent peril to the public health and safety caused by the existence of unsafe conditions in interim multiple dwellings and the absence of a filing system permitting the efficient identification of such interim multiple dwellings, requires adoption of the foregoing Rule and that the observance of the requirement of notice and opportunity for comment in writing would be contrary to the public interest. The foregoing Rule is therefore adopted to become effective on the date of publication in the City Record.

Dated: November 20, 1982
Filed with the City Clerk: November 30, 1982

/s/
CARL B. WEISBROD
Chairman

APPENDIX Y

EXCERPTS FROM LOFT BOARD LETTER

ANDREW E. SCHULTZ
CHAIRMAN

LEE FAMKES
DIRECTOR

RUDOLPH RINALDI
COMMISSIONER
DEPARTMENT OF BUILDINGS
EX OFFICIIO)

New York City Loft Board
Municipal Building - 23rd Floor South
One Centre St- Room 2358
New York, New York 10007
(212) 669-4375

Chuck Delaney
Samuel A. Jacobs
Cynthia Navaretta
Gerard Proefriedt
Elizabeth R. Wilde
Members

December 29, 1993

Dear IMD Owner or Representative:

There are a number of developments to communicate to you as we conclude another year and approach a new administration.

New Rules: The Loft Board has promulgated a series of new rules, effective December 6, 1993, involving non-institutional loans, Rent Guidelines Board (RGB) rent increases, and time limitations on coverage, rent overcharge and registration applications.

x x x

Proposed Rules: The Loft Board is also considering a package of revisions in its Code Compliance Regulations. The aim is to review these rules in light of our experience to date and to correct any areas which we find have not worked well in practice. Since this set of rules is being utilized by an increasing volume of buildings, we want to be sure they have been carefully reviewed and refined. Our particular goal is to make changes where where existing rules have contributed to delays and recourse to the administrative hearings process. The issues of elevators, rent adjustment exclusions based on deferred maintenance and preexisting violations, and the narrative statement and rent adjustment applications processes have been the initial priorities. We expect to have a final package developed in the next few months with a hearing by Spring.

x x x

Extensions: There has been an extraordinary volume of requests for extension of the October 1, 1993 building permit deadline.

While it is encouraging that many more owners than before are actively responding to our mailings and engaging themselves in the legalization process, the heavy volume

has also presented administrative burdens, since this new category of applications has been devised at a time of diminishing staff resources. For those owners who may still need further extensions, there are several steps which can be taken to ease processing time for the next round. First, the owner and architect should decide who is making the application, rather than each making a separate application. The person with the most direct knowledge should make the application. In the first round of extension requests, any building with duplicate filings was handled after buildings with one filing, and the same approach will be taken in the next round. Second, if the tenants support the extension application, the applicant should have them so advise us. Contested applications will be reviewed after uncontested ones, and the 25 day response time must be permitted to run, if there is no expression of tenant support or prior opportunity to comment.

X V X

Total IMD's to be legalized:
December 1992 - 784
December 1993 - 810

Buildings with C's of O:
December 1992 - 195 (25%)
December 1993 - 215 (27%)

Buildings with Permits or
Loft Board Certification:
December 1992 - 209 (27%)
December 1993 - 263 (32%)

Buildings with Narrative
Statements Filed:
December 1992 - 191 (24%)
December 1993 - 200 (25%)

Buildings with an Alteration
Application Filed:
December 1992 - 122 (16%)
December 1993 - 103 (13%)

Building w/o an Alteration

Application Filed:
December 1992 - 68 (9%)
December 1993 - 31 (4%)

Registration: There has also been an increased level of registration compliance. Whereas last year, there were 29 buildings unregistered and 167 whose registration was not current, this year with a larger IMD universe there are 21 unregistered and 145 not currently registered. For owners who are unable to complete registration due to outstanding fines, we have been able in many cases to work out time payment agreements which spread repayment over the registration period. Contact our registration unit for details. Another round of enforcement proceedings, seeking additional fines for non-registration or non-current registration, will begin after the first of the year.

Budget Reduction, Staff Shortages: The Loft Board lost another two positions and $50,000 in personnel funding, effective July 1, 1993, in the latest round of fiscal cut-backs. Particularly hard hit has been the hearings staff, which has now been reduced from five full-time and one per-diem hearing officers to a total of three, one of whom must also supervise the unit. While we will all continue to do our best to respond to pending applications, you should understand that there is a significant backlog and that our resources for responding have continued to diminish.

I hope this update has been helpful. Our best wishes for the holiday season and the new year ahead.

Yours truly,

Lee Fawkes

I hope this update has been helpful. Our best wishes for the holiday season and the new year ahead.

Copyright (c) 1986 The New York Times Company;
The New York Times

October 21, 1986, Tuesday, Late City Final Edition

SECTION: Section B; Page 1, Column 3; Metropolitan Desk

LENGTH: 1013 words

HEADLINE: SUITABLE FOR FRAMING; CITY MAKES IT OFFICIAL: THEY'RE ARTISTS

BYLINE: By GEORGIA DULLEA

BODY:

FIFTEEN years after the Museum of Modern Art acquired its first work by Benny Andrews, and four years after the National Endowment for the Arts named him director of its visual arts program, an advisory committee to the city's Department of Cultural Affairs sat in a conference room the other night pondering whether he was a professional artist. They concluded he was. The 55-year-old painter was relieved. Last month the panel, the Artist's Certification Committee, had postponed action on Mr. Andrews's application for official status as an artist because of a technicality. "I forgot to sign my name," he said, rolling his eyes. "We artists don't always think about dotting 'i's' and crossing 't's.' "

Breaking New Ground

When Mr. Andrews and 29 other men and women joined the ranks of the city's 5,000 certified artists last week, they were not only following in the steps of Willem de

Kooning, Red Grooms and Alex Katz, but also breaking new ground in the 15-year-old certification program. Theirs were the first applications to be approved under formal, written regulations rather than an informal process that has mystified a generation of professionals in the creative arts.

The chief reason so many artists submit themselves to the process is that certification entitles them to legally live and work in commercial or industrial zones like SoHo where spaces are large and filled with light and rents are — or once were — low.

A Seal and a Signature

Other artists say certification — in the form of a notarized certificate, suitable for framing, bearing the silver seal of the Cultural Affairs Department and the signature of Commissioner Bess Myerson — looks good on grant applications. It is also said to impress the Internal Revenue Service.

"Primarily our applications come from New York," said the program's coordinator, Joseph Giordano, "but we get them from other parts of the country and the world — Spain, Israel, France, Canada, Italy, India. If they meet our criteria, we certify them."

As he spoke the telephone rang in his office at 2 Columbus Circle. The caller, a multimedia artist, told Mr. Giordano he would not divulge his Social Security number on his application. "Why does Bess Myerson want my Social Security number?" he asked.

Mr. Giordano, a painter before becoming a bureaucrat, decided not to press the matter. "With artists," he said, "you've got to be careful about issues of personal freedom."

A Mystery, Even to Applicants

The Artist's Certification Committee has long been something of a mystery body, even to artists. Created in 1971, the 18 artists, art educators and administrators from various disciplines meet 10 times a year. Of the 600 applicants whose credentials are considered each year, 75 percent are said to receive certificates.

Until recently, however, no written rules on certification existed and the procedure has long been the subject of lore. Chuck DeLaney, a photographer and a tenant representative on the Loft Board, says stories are still told in SoHo of nonartists who submitted their children's fingerpaintings and were certified within a week.

A couple of weeks ago, Mr. Giordano visited several real-estate agencies in SoHo, posing as a prospective loft buyer. He said that at each space he was shown, he asked the agent, "Don't you need some kind of artist's certificate to live here?" Invariably, he said, the reply was "Don't worry about it" or "Do you know any artists?"

Rent-An-Artist

The question was an allusion to the "rent-an-artist" scheme, he said, in which nonartists rent out small corners of lofts to people in berets.

One reason the formal regulations were drafted was to discourage nonartists from moving into artists' districts. "The city is concerned that our fine artists have places to live and work, and SoHo was set aside for that purpose," Ms. Myerson said.

According to a lawyer for the department, Susan B. Rothschild, the regulations basically codify past procedure. One change makes the certificate valid as long as the artist remains at the same address. In the past, artists had to be recertified every three years.

Documentation Needed

An artist is defined as one "engaged in the fine arts, not the commercial arts, including but not necessarily limited to painting, sculpture, choreography, filmaking and the composition of music, regularly and on a professional basis."

Extensive documentation is required. A visual artist must submit 15 to 20 slides or photographs of recent work, in addition to a resume, review clippings, show catalogues and references.

"What we do," said Robert Blakely, a painter on the committee, "is review their materials — slides, tapes, films, anything that proves they're out there in the real world functioning as a real artists. When we're really confused, rather than turn them down, we'll make a studio visit, which usually clears things up."

When the artist lives in SoHo or NoHo, the process is more complex. These areas are designated artists' joint living-working districts.

A 'Discerning' Committee

"By law," Mr. Blakely said, "we're bound to take the space needed into consideration. Theoretically, an artist like Joseph Cornell, who makes little boxes, wouldn't need the same space as Rivera, the Mexican muralist."

Ms. Myerson, who has observed the committee at work, describes them as "very intense and arduous."

"I've watched these people poring over credentials of artists to prove that they are fine artists, not commercial artists," she said. "They examine slides, signatures on paintings and in some instances they've discovered fraudulent representation. They're discerning." Doris Diether, a dance

critic and former committee member, recalled the case of an applicant who photographed paintings on display and submitted the slides as samples of his own work.

"Someone on the committee laughed and said, 'Oh, come on. That's So-and-So's work," she said. "The supposed artist was very indignant when we turned him down."

GRAPHIC: Photo of Benny Andrews and wife Nene Humphrey (NYT/Dith Pran)

SUBJECT: ART; ZONING

ORGANIZATION: CULTURAL AFFAIRS, NEW YORK CITY DEPARTMENT OF

NAME: GIORDANO, JOSEPH; DULLEA, GEORGIA; ANDREWS, BENNY

GEOGRAPHIC: NEW YORK CITY; SOHO (NYC)

APPENDIX AA

STATE OF NEW YORK

8958

IN SENATE

June 29, 1992

AN ACT to amend the multiple dwelling law, in relation to the legalization of interim multiple dwellings and to amend chapter 349 of the laws of 1982 amending the multiple dwelling law relating to the legalization of de facto multiple dwellings in cities of over one million, in relation to terminating such legalization.*

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 284 of the multiple dwelling law, as added by chapter 349 of the laws of 1982, is amended to read as follows:

1. (I) The owner of an interim multiple dwelling (A) shall file an alteration application within nine montsh from the effective date of the act which added this article, and B) shall take all reasonable and necessary action to obtain an approved alteration permit within twelve months from such effective date, and (C) shall achieve compliance with the standards of safety and fire protection set forth in article seven-B of this chapter for the residential portions of the building within eighteen months from obtaining such alteration permit or eighteen months from such effective date, whichever is later, and (D) shall take all reasonable and necessary action to obtain a certificate of occupancy as a class A multiple dwelling for the residential portions of the building or

---

* EXPLANATION - Matter in *italics* (underscored) is new; matter in brackets [ ] is old Law to be omitted.

structure within thirty-six months from such effective date. The loft board may, upon good cause shown, and upon proof of compliance with the standards of safety and fire protection set forth in article seven-B of this chapter, twice extend the time of compliance with the requirement to obtain a residential certificate of occupancy for periods not to exceed twelve months each.

(li) An owner of an interim multiple dwelling who has not complied with the requirements of paragraph (l) of this subdivision by the effective date of the chapter of the laws of nineteen hundred ninety-two which added this paragraph shall hereafter be deemed in compliance with this subdivision provided that such owner files an alteration application by October first, nineteen hundred ninety-two, takes all reasonable and necessary action to obtain an approved alteration permit by October first, nineteen hundred ninety-three, achieves compliance with the standards of safety and fire protection set forth in article seven-B of thischapter for the residential portions of the building by April first, nineteen hundred ninety-five, or within eighteen months from obtaining and approved alteration permit, whichever is later, and takes all reasonable and necessary action to obtain a certificate of occupancy as a class A multiple swelling for the residential portions of the building or structure by June thirtieth, nineteen hundred ninety-five or within six months from achieving compliance with the aforementioned standards for the residential portions of the building, whichever is later.

(iii) An Owner who is unable to satisfy any requirement specified in paragraph (ii) of this subdivision for reasons beyond his/her control,including, but not limited to, a requirement to obtain a certificate of appropriateness for modification of a landmarked building, a need to obtain a variance from a board of standards and appeals, or the denials of reasonable access to a residential unit as required by paragraph (vii) of this subdivision, may apply to the loft board for an extension of time to meet the requirement specified in paragraph (ii) of this subdivision. The loft Board may grant an extension of time to meet a requirement specified in paragraph (ii) of this subdivision provided that

the owner demonstrates that he/she has made good faith efforts to satisfy the requirements.

(iv) If there is a finding by the loft board that an owner has failed to satisfy any requirement specified in (paragraph) paragraphs (I) and (ii) of this subdivision, such owner shall be subject to all penalties set forth in article eight of this chapter.

(iii) (v) In addition to the penalties provided in article eight of this chapter, if there is a finding by the loft board than an owner has failed to satisfy any requirement specified in (paragraph) paragraphs (i) and (ii) of this subdivision, a court may order specific performance to enforce the provisions of this article upon the application of three occupants of separate residential units qualified for the protection of this article, or upon the application of the minicipality.

[(iv)] (vi) If, as a consequence of an owner's unlawful failure to comply with the provisions of (paragraph) paragraphs (i) and (ii) of this subdivision, any residential occupant qualified for protection pursuant to this article is required to vacate his or her unit as a result of a muncipal vacate order, such occupant may recover from the owner the fair market value of any improvements made by such tenant [,] and reasonable moving costs. Any vacate order issued as to such unit by a local government shall be deemed an order to the owner to correct the non-compliant conditions, subject to the provisions of this article. Furthermore, when such correction has been made, such occupant shall have the right to re-occupy his or her unit[,] and shall be entitled to all applicable tenant protections of this article.

[(v)] (vii) The occupants of a building shall, upon appropriate notice regarding the timing and scope of the work required, afford the owner reasonable access to their units so that the work necessary for compliance with this article can be carried out. Access shall also be afforded, upon reasonable prior notice, for the purpose of inspecting and surveying units as may be required to comply with the provisions of this article and article seven-B of this chapter. Failure to comply with anorder of the loft board regarding access shall be grounds for eviction of a tenant.

SS 2. Subdivision 2 of section 286 of the multiple dwelling law, as added by chapter 349 of the laws of 1982, is

amended to read as follows: 2. (i) Prior to compliance with safety and fire protection standards of article seven-B of this chapter, residential occupants qualified for protection pursuant to this article shall be entitled to continued occupancy, provided that the unit is their primary residence, and shall pay the same rent, including escalations, specified in their lease or rental agreement to the extent to which such lease of rental agreement remains in effect or, in the absence of a lease or rental agreement, the same rent most recently paid and accepted by the owner, if there is no lease or other rental agreement in effect, rent adjustments prior to article seven-B compliance shall be in conformity with guidelines to be set by the loft board for such residential occupants within six months from the effective date of this article.

(ii) In addition to any rent adjustment pursuant to paragraph (i) of this subdivision, on or after the effective date of this paragraph, the rent for residential units in interim multiple dwellings that are not yet in compliance with the requirements of subdivision one of section two hundred eighty-four of this article shall be adjusted as follows:

(A) Upon the owners' filing of an alteration application, as required by paragraph (ii) of subdivision one of section two hundred eighty-four of this article, an adjustment equal to six percent of the base rent in effect at the time the owner files the alteration application.

(B) Upon obtaining an alteration permit, as required by paragraph (ii) of subdivision one of section two hundred eighty-four of this article, an adjustment equal to eight percent of the base rent in effect at the time the owner obtains the alteration permit.

(C) Upon achieving compliance with the standards of safety and fire protection set forth in article seven-B of this chapter for the residential portions of the building, an adjustment equal to six percent of the base rent in effect at the time the owner achieves such complaince.

(D) Owners who filed an alteration application prior to the effective date of this subparagraph shall be entitled to a prospective adjustment equal to six percent of the base rent on the effective date of this subparagraph.

(E) Owners who obtained an alteration permit prior to the effective date of this subparagraph shall be entitled to a prospective adjustment equal to fourteen percent of the base rent on the effective date of this subparagraph.

(F) Owners who achieved compliance with the standards of safety and fire protection set forth in article seven-B of this chapter for the residential portions of the building prior to the effective date of this subparagraph shall be entitled to a prospective adjustment equal to twenty percent of the base rent on the effective date of this subparagraph.

(iii) Any rent adjustments pursuant to paragraph (ii) of this subdivision shall not apply to units which were rented at market value after June twenty-first, nineteen hundred eighty-two and prior to the effective date of this paragraph.

(iv) Payment of any rent adjustments pursuant to paragraph (ii) of this subdivision shall commence the month immediately following the month in which the act entitling the owner to the adjustment occurred.

Sec. 3 Section 277 of the multiple dwelling law is amended by adding a new subdivision 16 to read as follows:

16. The requirements and standards prescribed in this section shall be subject to variation in specific cases by the commissioner of buildings, or the board of standards and appeals, of such city under and pursuant to the provisions of paragraph two of subdivision b of section six hundred forty-five and section six hundred sixty-six of the New York City charter.

Sec. 4. Section 3 of chapter 349 of the laws of 1982 amending the multiple dwelling law relating to the legalization of interim multiple dwellings, as amended by chapter 226 of the laws of 1992, is amended to read as follows:

Sec. 3. Effective date and termination. This act shall take effect immediately. The provisions of this act and all regulations, orders and requirements thereunder shall terminate [~~June 28, 1992, except in their applicability to buildings with six or more residential tenants as of the effective date in which case termination shall occur twelve years from the effective date~~] June 30, 1996.

Sec. 5. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after June 21, 1992.

APPENDIX BB

NUMBER XXXIX

THE FEDERALIST

THE CONFORMITY OF THE PLAN TO REPUBLICAN PRINCIPLES:

* * *

... Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and the State governments; and in its express guaranty of the republican form to each of the latter . . .

* * *

PUBLIUS [Madison]

* * *

NUMBER XLIV

THE SAME VIEW CONTINUED AND CONCLUDED

... Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine

sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society. The prohibition with respect to titles of nobility is copied from the Articles of Confederation and needs no comment.

* * *

PUBLIUS [Madison]

* * *

NUMBER LXXXIV

CONCERNING SEVERAL MISCELLANEOUS OBJECTIONS

* * *

The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of TITLES OF NOBILITY, *to which we have no corresponding prohibition in our Constitution*, are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary

imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone, in reference to the latter, are well worthy of recital: "To bereave a man of life [says he] or by violence to confiscate his estate, . . . hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government."

* * *

... Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the cornerstone of republican government; for so long as they are excluded there can never be serious danger that the government will be any other than that of the people. ...

* * *

PUBLIUS [Hamilton]

NUMBER LXXXV

CONCLUSION

* * *

The additional securities to republican government, to liberty, and to property, to be derived from the adoption of the plan under consideration, consist chiefly in the restraints which

the preservation of the Union will impose on local factions and insurrections, and on the ambition of powerful individuals in single States who might acquire credit and influence enough from leaders and favorites to become the despots of the people; in the diminution of the opportunities to foreign intrigue, which the dissolution of the Confederacy would invite and facilitate; in the prevention of extensive military establishments, which could not fail to grow out of wars between the States in a disunited situation; in the express guaranty of a republican form of government to each; in the absolute and universal exclusion of titles of nobility; and in the precautions against the repetition of those practices on the part of the State governments which have undermined the foundations of property and credit, have planted mutual distrust in the breasts of all classes of citizens, and have occasioned an almost universal prostration of morals.

* * *

PUBLIUS [Hamilton]

APPENDIX CC

Copyright (c) 1988 The New York Times Company;
The New York Times

June 12, 1988, Sunday, Late City Final Edition

SECTION: Section 10; Page 11, Column 1; Real Estate Desk

LENGTH: 1424 Words

HEADLINE: IF YOU'RE THINKING OF LIVING IN:. SoHo

BYLINE: By MARK McCAIN

BODY:

THAT chic and gritty district of Manhattan known as SoHo should post a warning at its borders: Only rich artists need apply. For what was once a refuge for painters seeking cheap space to work on huge canvases has been bid up like the prices of Warhol knickknacks at a Sotheby's auction.

Along narrow, cobblestoned streets, loft buildings from a century ago — when Manhattan boasted manufacturing muscle — now house sculptors, painters and people simply willing to pay the price.

Technically, only city-certified artists can move into SoHo, except for a few buildings open to anyone. The theory is that artists need large, inexpensive spaces to create their work. But frenzied demand for Manhattan housing is pushing that theory beyond its limits.

On Wooster Street, a 7,500-square-foot loft has been transformed into a fantasyland of more than a dozen rooms

dressed up with architectural artifacts like marble fireplaces. It's for sale at $2.3 million.

There are cheaper lofts, of course, but below $500,000 the options are limited and modest. The raw loft space, decrepit and dirty, that attracted artists to SoHo a decade ago is rarely for sale today. When a building at 123 Greene Street became a residential co-op recently, the unrenovated 4,000-square-foot floors sold briskly for about $800,000 apiece.

"Ten, 15 years ago when artists first came here, a lot of them were young and living together," said Anthony Dapolito, who has been watching the neighborhood from his bakery on Prince Street for half a century. "Now they all have babies and they're just like everyone else. They're interested in day-care centers and schools. They want playgrounds."

But no one left room for playgrounds in SoHo, which is zoned for manufacturing. So its metamorphosis from factory grime to family comforts is incomplete.

And that appeals to many of the residents, who enjoy the eclectic, often volatile mix of artistic and commercial forces in this 33-block district, named SoHo because it extends south of Houston Street to Canal Street. Even to tourists who crowd the streets on weekends, the incongruity is hard to miss.

Within a few yards of Fanelli Cafe, a friendly beer-and-burger joint at Prince and Mercer Streets, there are a lumber yard, an art gallery, a machine shop, a fashion boutique, and a store with more photography books than nearly any competitor in North America.

Most of SoHo lies within a historic district created in 1971 to protect "the largest concentration of cast-iron facades *anywhere* in the world." Greene Street is especially rich in ornate columns, entwined serpents, pilasters and arches.

Even before the Italianate cast-iron architecture began emerging in the late 1860's, SoHo had a commercial appeal. Warehouses and stables lined the streets — having pushed out the modest clapboard houses of blacksmiths and other workers who moved in after farmers sold off their acreage in the late 1700's.

Although the formal lines of historic SoHo are rigid, its neighborhood spirit is fluid, spreading north and west, while Chinatown edges up from the southeast. Its free-spirited disdain of boundaries helps make SoHo a creative, chaotic place. It would rather assault senses than assuage them.

That rebellious spirit carries over into regulatory matters. Unreliable freight elevators converted illegally to passenger use are common. So are dozens of other building-code violations. Some co-ops lack certificates of occupancy, which New York City requires of all residential structures. For a buyer, that means a deal must be all cash because banks will not finance illegal residences.

Since 1971, when a zoning resolution was adopted to allow living-working quarters in SoHo, new residents have been required to be certified as artists by the Department of Cultural Affairs.

But many people who would be hard pressed to draw a stick figure have moved into SoHo without certification. So last fall, in an admission of past enforcement failures and a vow of future vigilance, the city offered amnesty to SoHo residents who broke the rules.

Since then, co-op boards and real estate brokers have been reluctant to sidestep certification. The city has yet to display a hard-line stance, but people fear the city will initiate eviction proceedings against new residents who flout it.

"Like manufacturers, artists use their space to create their work, so we feel we're justified in making a special exception for them," said Susan B. Rothschild, counsel to the Department of Cultural Affairs. "It's the artists who are largely responsible for the excitement and vitality of SoHo today."

Above half of the 4,000 residential lofts in SoHo are rental, but they are difficult to find on the market. And for the people who live within them, they often are difficult to hang onto only because of their murky legal status.

"It's not the typical nature of artists to become involved with lawyers, bureaucracy and paperwork — but we've become pros at it," said Marie Dormuth, an artist who moved into a loft on Canal Street 11 years ago. "Nearly every artist I know has very expensive legal counsel."

Part of their legal time is focused on 1985 regulations the city Loft Board adopted to force renovations in nearly 1,000 residential loft buildings with health, safety or fire code violations. First, debate raged over how renovation costs should be shared; now tenant activists fear that hundreds will be evicted from buildings where owners cannot, or will not, remove violations by the 1992 deadline.

"It's a real distraction from our work, but we have to fight because this housing stock is a rare resource that belongs to the artists," Ms. Dormuth declared. "We pioneered this neighborhood, and we're still a strong group, even though now we've surrounded by gilded French restaurants and boutiques."

IT is those restaurants and boutiques — along with the art galleries — that define SoHo for many visitors. From Dean & DeLuca, a cornucopia of fresh and exotic foods, to Chanterelle, the only downtown restaurant to earn four stars from The New York Times restaurant critic, good food is never far way in SoHo.

Nor is provocative art. In addition to the roster of famous galleries operated by the likes of Max Protech, Diane Brown and Leo Castelli, new galleries seemingly germinate overnight.

Throughout SoHo, a core of establishments have prospered for more than a decade — while a dizzying parade of others pass through, often nipped by rising rents, especially along the prime retail street, West Broadway.

"It's like West Broadway gets a personality makeover at least once a year," said David Matthews, a dancer who lives on Greene Street. "Right now it's all fancy boutiques and cafes, although some kitschy galleries and T-shirt shops have opened up to tap the tourist market."

Yet as a community created within an old manufacturing district, SoHo lags behind in basics like supermarkets, barbershops and variety stores. Schools, too, tend to be outside the neighborhood.

Parents in SoHo can choose among more than a dozen private and parochial schools elsewhere in downtown Manhattan, and three public elementary schools: P.S. 3 at 490 Hudson Street, P.S. 41 at 116 West 11th Street and P.S. 234 at 334 Greenwich Street. The High School for Humanities, about 20 blocks north at 351 West 18th Street, is a frequent choice for older students.

"Like every other community we have lots of little problems," said Mr. Dapolito, the 67-year-old baker, "but SoHo has survived the years well — and so have I. When everyone was eating Wonder Bread and TipTop I thought it was the end of the world for bakeries. But these artists, they go wild for my bread.

"I don't think we could have gotten a better class of people than the artists," he added. "They're intelligent, they're hard working and they're nonviolent."

GAZETTEER

Population: 8,400 (1980 census).

Median household income: $36,400 (1985 estimate)

Median 2,000-square-foot loft price: $535,000.

Median 2,000-square-foot loft rent: $3,250.

Rush-hour commutation to midtown: 15 minutes on the IRT, BMT or IND line, 20 minutes by bus on the major avenues.

Councilwoman: Miriam Friedlander, Democrat.

Blazing Barrels: In the 1800's firefighters called SoHo "Hell's Hundred Acres" because of fires that broke out repeatedly in warehouses overcrowded with cloth, chemicals and other flammables — spurring owners to began erecting brick and cast-iron warehouses around 1870.

GRAPHIC: Photos of Chanterelle restaurant at 89 Grand Street; interior of Dean & DeLuca, exotic food store at 121 Prince Street (NYT/Peter Freed); map of SoHo (NYT)

SUBJECT: SOCIAL CONDITIONS AND TRENDS; GEOGRAPHIC PROFILES

NAME: MCCAIN, MARK

GEOGRAPHIC: NEW YORK CITY; SOHO AREA (SOUTH HOUSTON INDUSTRIAL DISTRICT) (NYC)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

640 BROADWAY RENAISSANCE COMPANY,	:	
	:	AFFIDAVIT IN
Plaintiff,	:	SUPPORT OF
	:	PLAINTIFF'S
- against -	:	MOTION FOR
	:	SUMMARY
MARIO CUOMO, as Governor of The State of New York, *et al.*,	:	JUDGMENT
	:	
Defendant.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARTIN R. FINE, being duly sworn, deposes and says:

* * *

13. It is also an undeniable fact that 640 Broadway is not structurally suited as a multiple dwelling. In order to make the building suitable for residential use, major structural changes would be required, including the installation of fireproof walls, stairways and fire escapes, as well as the installation of new elevators and substantially new plumbing, heating and electrical systems. In addition, the Owner would have to comply with a myriad of City and State laws which only apply to the operation of residential buildings, but not to commercial buildings.

manufacturing enterprises. While there had been illegal residential use prior to plaintiff's purchase, in fact, the plaintiff eliminated such use by removing all the residential tenants after the plaintiff took title.[2]

* * *

18. In each instance, the lease was the product of an arms-length transaction with a well-educated, sophisticated adult who either was represented by, or had access to an attorney. In each instance, the premises were vacant, the occupant who executed the lease had a residence elsewhere and expressly represented to the Owner that the unit would not be used as a residence. The occupants further represented that they knew it was illegal to reside in the building; that they would comply with all laws relating to the use of the premises; and that they would indemnify the Owner and hold it harmless from any claims, penalties, loss, damage or expense, including attorneys fees, incurred because of their illegal use of the premises.

19. The plaintiff had good reason to insist upon each occupant's specific promise that the unit would not be used as a residence. It is a well-known fact that in the late 1970's it became quite chic to live in commercial loft buildings in lower Manhattan. It was to protect the plaintiff from those adventurous individuals who were willing to flaunt the building code and applicable zoning laws, that *this building owner* insisted upon specific written assurances from all prospective tenants that they would use their units solely for commercial purposes, and would indemnify the plaintiff against all damages resulting from any illegal use. Moreover, their leases specifically required the tenants to pay for the cost of any subsequently required building improvement or changes.

20. Had the prospective tenants not made those specific written representations, the plaintiff never would have entered into any lease agreements with them.

* * *

25. Furthermore, it is abundantly clear from all of the other lease provisions that the premises were rented exclusively for commercial purposes. The following provisions establish the intention of the parties to enter a commercial, and not a residential landlord/tenant relationship:

a. Paragraph 30 of the lease requires the landlord to provide heat and elevator service only on business days from 8 a.m. until 6 p.m. and on Saturdays from 8 a.m. until 1 p.m. The landlord is not required to furnish these services in the evenings, on Saturday afternoons, or on Sundays.

b. Also pursuant to Paragraph 30, the *tenant* is obligated "to pay Landlord the cost of removal of any of tenant's refuse and rubbish from the building; and pursuant to Paragraph 4, the *tenant* is obligated to arrange and pay for the extermination of vermin.

c. Pursuant to Paragraph 41, the *tenant* is obligated to "replace all damaged or broken plate glass or other glass in or about the demised premises."

d. Pursuant to Paragraph 42, the *tenant* at its sole cost and expense shall be solely responsible for and pay for all utilities and/or services used and required by tenant, including electricity and gas and water."

e. Pursuant to Paragraph 39, the *tenant* is obligated to "obtain and maintain at Tenants' sole cost and expense all licenses and permits from any and all governmental authorities having jurisdiction of the demised premises which may be necessary for the conduct of Tenant's business therein."

f. Pursuant to Paragraph 78, the *tenant* is obligated to maintain a $500,000.00 liability insurance policy in effect for the benefit of the landlord and the tenant.

g. Pursuant to Paragraph 54, the landlord is entitled to periodic rent increases based on the Consumer Price Index.

h. Pursuant to Paragraph 72, *the tenants agreed to accept the demised premises "as is" in its condition at the commencement of the lease term.*

* * *

26. The foregoing provisions are found only in commercial leases. Clearly, these were not residential leases. The plaintiff never agreed to provide those services which are required for residential tenants. In determining the rent, which was freely negotiated, the plaintiff did not factor in the cost of providing residential services, because the leases were commercial, not residential in nature, and because the building was zoned for manufacturing and office use only. Neither did the rents reflect the enormous costs that would be involved in converting the building into a legal multiple dwelling, even if that were legally and structurally possible.

31. Moreover, my attorneys advise me that these deliberate violations by the occupants constitute a criminal offense under Section 304(1) of the New York State Multiple Dwelling Law, which provides that every person who violates or assists in the violation of the multiple dwelling law shall be guilty of a misdemeanor punishable by fines and/or imprisonment. *N.Y. Mult. Dwell. Law* §304(1) (McKinney 1986).

* * *

33. Besides their illegal residential use, the occupants have violated their leases by their deliberate failure to quit and surrender the premises upon the expiration of their lease terms.

34. All of the leases at issue here were first executed in the period between 1978 and 1982. Each was a standard commercial loft lease which provided for a short term of between two to six years. All of these leases, except one, have expired.[3] Annexed hereto as Exhibit F is a list of the occupants and the execution and expiration dates of their leases.

* * *

Moreover all of the occupants assert the right to reside on the premises indefinitely under the protection of the Loft Law, which, they claim, permits them to live in their units rent free.

36. The occupants have violated their leases in other ways. Primary among these violations is the persistent failure on the part of the occupants to pay rent, rent increases, and/or use and occupancy for their units.

37. Since the determination of the Loft Board, none of the occupants have paid rent. Furthermore, many occupants, in reliance upon the provisions of the Loft Law, stopped paying rent after its enactment. For instance, Hannah Eshel has not paid rent since October of 1984 and owes an amount in excess of $70,000.00. Other occupants owe amounts ranging from $10,500.00 to $36,000.00. At the present time, the Owner is owed rent, additional rent and/or use and occupancy in the amount of at least $465,017.94 (calculated at the rates called for in the expired leases). Annexed hereto as Exhibit G is a list of the rent arrears for each unit as well as their current market values.

* * *

THE OWNER'S ATTEMPTS TO IMPROVE CONDITIONS AT 640 BROADWAY

• • •

43. Extensive renovations and repairs were made to upgrade the building and to cure the building and fire code violations that the previous tenants had caused. For instance, a new boiler was installed in 1988 at a cost of approximately $45,000.00, which is more than adequate to meet the needs of a commercial loft building operated in a manner consistent with the requirements of the leases. In addition to general renovations in the public areas, a new front door, mail boxes, an intercom security system were installed at the Owner's expense, although not required by the leases.

• • •

47. In 1982 after the passage of the Loft Law, the Owner abandoned its attempt to alter the permissible use of the building because of the statute's oppressive and confiscatory provisions. Thus when the plaintiff made a good faith effort to legally convert the building to residential use, the City would not allow it; and now that the plaintiff vehemently objects, the State and City, under the pain of non-collection of rent, and the imposition of crushing penalties, seek to force the Owner to apply for a discretionary zoning change and totally change the existing certificate of occupancy and force the unwanted conversion of 640 Broadway into a multiple dwelling. This is in direct violation of the leases, the existing certificate of occupancy and the zoning laws.

• • •

51. Among other provisions, the Loft Law established an administrative body called the Loft Board (MDL §282). The Loft Board consists of from four to nine members who purportedly represent the public, the real estate industry, loft residential tenants, and loft manufacturing interests, but in fact are all political appointees of the Mayor of the City of New York and serve at his whim and pleasure.[4]

52. Among other duties, the Loft Board is charged with the responsibility of determining which buildings are covered by the Loft Law. The Loft Board also issues regulations, *which currently exceed several hundred pages*, and further totally negate the basic rights of property owners like the plaintiff.

* * *

55. The economic impact of this scheme on an owner such as the plaintiff is devastating. Not only must an owner bear all of the economic risk throughout a conversion process which could take several years, but it is certain that the owner will not recoup any expenses for an extended period of time, and will *never* recoup *all* of the conversion costs. These statutory provisions are in direct conflict with the leases for 640 Broadway which obligate the tenants to pay for the cost of all "non-structural repairs" and all other legally required building alterations (Exhibit E, Pars. 4, 6, 39, 55, 69).

* * *

58. As originally enacted, the Loft Law contained a mechanism for exemptions from coverage for those buildings for which compliance would cause an "unjustifiable hardship" (MDL §285(2)). Hardship exemptions were purportedly available in cases where the cost of compliance rendered the residential conversion infeasible. However, those hardship

provisions (which were both speculative and illusory) *lapsed* prior to the finding by the Loft Board that 640 Broadway was covered by the Loft Law (MDL §285[2]).

59. Thus, even though the residential conversion of this building will cause the plaintiff devastating economic hardship, there exists no statutory basis for avoiding compliance with the Loft Law. Moreover, it is a matter of public record that no hardship exemption has ever been granted.

* * *

63. Apparently the legislature determined that because artists supposedly require large amounts of space for their work, and because the financial remunerations of artists are supposedly "small," the conversion of former manufacturing and commercial loft buildings should be *encouraged* to provide housing for artists. However, in conjunction with Article 7-C (the Loft Law) these statutes do more than merely encourage housing for artists, they mandate the conscription and the forced conversion of certain targeted buildings for that purpose without paying the Owner for the property rights that have clearly been seized.

* * *

65. The end result of this statutory scheme is that the owners of these arbitrarily selected commercial loft buildings are being compelled to subsidize artists in the pursuit of their alleged artistic endeavors by the State of New York which has gratuitously turned over virtually all of the Owner's basic property rights to the illegal residential tenants. Incredibly, the whole legislative scheme is premised upon the deliberate criminal acts of these tenants.

* * *

67. In essence, this amounts to a "reward" to the tenants for their deliberate illegal occupation of the premises in knowing violation of the leases, the certificate of occupancy, the building code and the zoning laws. This "reward" consists of the grant of virtual life estates in the premises to the occupants, and a forcible and massive turnover of the Owner's property rights to former tenants without just compensation.

• • •

80. The total effect of the Loft Law is to confiscate the building from the plaintiff and to give essential long-term control of the property to the occupants, thereby rewarding them for their deliberate violations of the law and their leases.

81. Pursuant to the Loft Law, the fact that illegal residential use violates the law and the leases cannot serve as a basis for removing the illegal-use tenants, nor can the fact that the leases long ago expired (MDL §286). These restrictions demonstrate the coercive heart of the statute and its confiscatory nature.

82. Under the Loft Law, there is one and only one way that affected owners can recover any rent or the value of the use and occupancy of the units in the building. According to the Loft Law, only affected owners who are "in compliance" with the statute can recover rent. In order to be in compliance with the Loft Law, an affected owner must capitulate to the confiscatory provisions of that law. The owner must register with the Loft Board and must comply with a schedule, the end of which is the forced conversion of the building to a legal multiple dwelling at huge and uncompensated expense. And before any of the work can even begin, the plaintiff must apply for and be granted a discretionary zoning change known as a "special permit," which may never be granted, which may take years to obtain, and which is subject to the discretionary review by the Community Planning Board, the City Planning

****

84. By permitting the occupants to remain in long-term residential rent-free occupancy, the State has authorized the virtual seizure by the occupants of the Owner's building, and the State has affirmatively granted the former tenants legal estates in the property. The Owner never authorized, and in fact expressly prohibited residential use; the State authorized that. It was not the Owner who authorized the former tenants to remain in occupancy after the expiration of their leases; the State did that. The Owner never authorized indefinite lease renewals; the State did that. The Owner never authorized the occupants to live in the building rent free; the State did that.

* * *

86. The right to collect rent on leased property is the most fundamental right of property ownership, without which the entire American system of real estate ownership and financing would collapse.

* * *

92. Thus, the Loft Law requires the Owner to permit the permanent physical occupation of its building by third parties arbitrarily selected by the State and who now exercise their complete dominion over the property, and the Owner has no control over the timing, extent or nature of the invasion or its cost.

93. In deciding this motion, I respectfully urge this court to consider the fact that the only commodity that a property owner like the plaintiff has to sell is the use and occupancy of the space within its building. It is the plaintiff's only stock in trade. To deprive the Owner of the monetary value of the property, and all of its rights to use, possess or rent the property is to extinguish virtually all rights of ownership.

THE LOFT LAW AND RELATED STATUTES IMPOSE AN UNFAIR BURDEN ON THE OWNER TO SUBSIDIZE ARTISTS

* * *

100. Here, the subsidy takes two forms. First, the Owner is required to rehabilitate this almost 100 year-old commercial structure at a cost of nearly Two Million Dollars in order to make it suitable for residential use. Moreover, because only certain costs can be passed on to the occupants, and even though these costs must be amortized over a ten or fifteen year period, full recoupment is unlikely. The second form of subsidy occurs because the Owner is compelled to totally renovate its existing commercial building to provide living quarters for artists indefinitely and at reduced and strictly controlled rents under the Emergency Tenant Protection Act of 1974.

* * *

103. While subsidized housing for "artists", like housing for the elderly or the homeless, may be commendable government programs, it is simply unfair and unconstitutional to impose the entire economic cost of remedying such social problems on a small group of arbitrarily selected owners like the plaintiff.

THE STATUTORY SCHEME IS NOT RATIONALLY RELATED TO ITS STATED PURPOSE

104. My attorneys advise me that in order for a statute which treats citizens unequally to pass constitutional muster, it must be rationally related to a legitimate state purpose.

105. Articles 7-B and 7-C, in conjunction with the Zoning Resolution, are not rationally related to the stated

purpose of providing low-income artist with inexpensive housing and work space. Most of the persons protected by these laws are not artists, nor are they in a low-income bracket, and of those who are artists, many do not require large living/work quarters for the pursuit of their artistic endeavors.

106. Annexed hereto as Exhibit L is a recent article from the *New York Times* which noted that the median 2,000 square-foot loft price in SoHo is $535,000.00; the median 2,000 square-foot rent is $3,250.00; and the median household income is $36,400.00. *N.Y. Times*, June 12, 1988, §10, p. 11, col. 1. While the neighborhood in which 640 Broadway is located may have been pioneered by artists seeking inexpensive work space, it is now populated by chic and expensive boutiques, galleries and restaurants. Technically, only certified artists are entitled to loft spaces, but as a practical matter as the *New York Times* warned, "[o]nly rich artists need apply." *Id.*

• • •

109. The Owner of 640 Broadway has relied in good faith on the existing zoning regulations which prohibit the residential use of this building, as well as the lawfully issued certificate of occupancy for commercial use, which dates back to 1966. This certificate of occupancy cannot be recalled, cancelled or vacated at the whim of the government.

110. The government should not be permitted to compel the plaintiff to apply for a change in the existing zoning or certificate of occupancy for this building. The plaintiff has a vested property right in the existing certificate of occupancy issued to the building and the zoning classification which permit the building to be used only for commercial and office purposes. Not only is this the only lawful use, but it is the only

use that the plaintiff desires, and the only use permitted in the occupants' leases.

111. In addition to depriving the Owner of the right to decide the lawful use to which its building will be put, the Loft Law also deprives the Owner of the right to decide how it will invest its money, and forces the Owner into a new business — residential housing — at enormous and uncompensated expense. In order to bring the building into full compliance with the applicable multiple dwelling laws, the Owner will have to spend upwards of Two Million Dollars to attempt to obtain a type of zoning variance called a "special permit" it does not want; to make major structural alterations and improvement which it does not desire or need; so that the building can be

• • •

116. Thus, the Loft Law has substantially altered the contractual relationship between the defendant-occupants and the Owner, and has superimposed additional obligations conspicuously beyond what the Owner agreed to undertake.

117. My attorneys advise me that this constitutes an unconstitutional impairment of the obligations of a private contrary in violation of Article I, §10 of the United States Constitution.

118. The determination of whether a building is covered by the Loft Law depends in part upon whether a residential certificate of occupancy had been issued to that building prior to the effective date of the statute (MDL §281(1)). Thus, the legislature created two classes of loft buildings, and imposed different obligations on the owners in these separate classes. It is only the owners of the applicable buildings who had not obtained residential certificates of occupancy by June 21, 1982 the date of the enactment of the Loft Law, who are compelled by the Loft Law to convert their buildings to residential use and who are thereafter subjected to rent control.

120. In fact, the imposition of rent control is counter-productive, because rather than provide an incentive to owners to undertake these massive rehabilitation projects, the law makes it virtually impossible for the affected owners to obtain financing for or recoup their forced investments. Clearly, by cavalierly subjecting these buildings to commercial rent control, the Loft Law goes far beyond its stated purpose.

121. My attorneys advised me that a statute which creates an impermissible classification which bears no rational relation to a legitimate government objective is violative of the equal protection clause of the Fourteenth Amendment.

123. What the Loft law did was to reward a specific and identifiable group of tenants for their wrongdoing by retroactively transferring to them a bundle of property rights, and then compelling a select group of commercial building owners to provide lifetime subsidies to these lawbreakers in the form of costly building improvements, controlled rents, and the forced dedication of the building to the tenants' control.

124. Although the Loft Law was allegedly enacted to alleviate a housing emergency, the application of Article 7-C to the owners of buildings classified as interim multiple dwellings and not to other commercial and/or residential property owners rests on grounds wholly irrelevant to the achievement of the state's objectives.

125. Moreover, although the Owner and other commercial loft landlords subject to the Loft Law have not been convicted of any crime, these severe punishments have been inflicted upon them by the New York State Legislature in violation of the Bill of Attainder Clause of the United States Constitution.

126. The economic impact on the affected owners is devastating. This commercial building owner will be compelled to undertake renovations costing up to Two Million Dollars,

and is the consigned to the arbitrary and capricious limitations on income set by the Loft Law. The building is subjected to the most strict form of rent control and is consequently drastically diminished in value, and the Owner is forever stripped of his property rights in the fixtures and numerous other basic property rights. These economic burdens are further compounded by the confiscation of the Owner's property rights to decide the lawful use to which the building will be put; to choose its tenants; and to negotiate the terms of its leases and even to collect rent for an extended period of time.

127. Not only is the punishment severe, but it is also inescapable. The Loft Law, originally contained a speculative and illusory "hardship exemption," but those provisions expired, and are no longer available to owners like the plaintiff whose buildings have recently been determined to be covered by the law. Consequently, even though compliance with the Loft Law will cause a devastating economic hardship, there is no statutory basis for avoiding compliance. Moreover, no hardship exemption has ever been granted.

CONCLUSION

128. For all of the foregoing reasons, it is respectfully requested that this Court grant the plaintiff's motion for summary judgment on all of the constitutional claims asserted in Counts 1 through 9 of the complaint together with such other relief as to this Court seems just.

/s/ MARTIN R. FINE

Sworn to before me this
28th day of June, 1989

/s/ Eric H. Gruber
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

640 BROADWAY RENAISSANCE COMPANY, a New York Partnership : AFFIDAVIT IN OPPOSITION TO CROSS-MOTION

Plaintiff, :

-against- :

MARIO CUOMO, as Governor of The State of New York, :

----------X

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

MARTIN R. FINE, being duly sworn, deposes and says:

* * *

7. Rather than change the law so as to encourage the *permissive* conversion of loft buildings, instead the City and the State adopted a program which made such conversions *compulsory and confiscatory*. The compulsion includes the fact that if an owner does not convert, he cannot remove the illegal residential tenants from possession, and for as long as the illegal conditions created by the tenants' occupancy exist, the owner cannot collect rent and, without rent, will lose the building by City confiscation.

* * *

10. Any claimed "emergency" which may have existed, was totally self-created by the loft tenants' utter disregard for the clear provisions of law and their leases. In the plaintiff's case, the residential use of the lofts was prohibited both by zoning, fire, safety and building laws. In disobeying these laws and in dishonoring their leases, the tenants created any "emergency" which may have existed. The truth of the matter is that the only "emergency" was that the tenants' leases had expired by their own terms, which the tenants did not like.

* * *

12. If there was any "emergency," it was caused by the deliberate and illegal acts of the very same tenants who now claim lifetime residential estates in the plaintiff's commercial building based solely upon their illegal use and occupation under a short-term commercial lease.

13. But even if there was an "emergency," it is clear that it was not so wide-spread so as to constitute a "public" problem. Rather, the Loft Law represented an attempt by government to reward, for political reasons, an arbitrarily and pre-selected group of tenants for their own illegal activities.

14. That the purported emergency was not widespread, is evidenced by Paragraph 18 of the affidavit of Lee Fawkes in which he admits that since 1982, only 120 buildings have fully complied with the Loft Law, while another 290 have begun the legalization process. Moreover, a recent article in the *New York Law Journal* reported that there are nearly 650 loft buildings in New York City which are not in compliance with the Loft Law. Anderson, *Loft Landlords Limited on Suits for Back Rent*, N.Y.L.J., July 10, 1989, p. 1, col. 3. A copy of this article is annexed hereto as Exhibit "A." Thus, it appears that a total of only approximately 1,000 buildings are affected by the Loft Law out of the hundreds of thousands of buildings located in New York City.

15. Neither can it be disputed that the "covered" tenants were pre-selected for coverage. Despite the fact that the Loft Law took effect on June 21, 1982, it applied only to tenants who had been in residential occupancy during the period of April 1, 1980 through December 1, 1981.

* * *

17. Thus even before the Loft Law was enacted, the City knew the addresses of the affected buildings and the names of most, if not all, of the tenants who would be affected. Therefore, by definition, this was special interest legislation.

18. Furthermore, lists of buildings and affected tenants were compiled by an organization of loft tenants known as the Lower Manhattan Loft Tenants Association. This list was made available to the City and State government, who worked in conjunction with the Manhattan Loft Tenants Association to prepare the legislation which was ultimately adopted by the State Legislature.

* * *

36. It is a matter of public record that the Loft Board consists of a group of persons appointed by the Mayor of the City of New York, who serve at his whim and will. These politically-connected hacks do not represent the interests of property owners. To the contrary, the Loft Board has proven itself to be nothing more than a group of puppets whose strings are pulled by pro-tenant political interests in the City of New York.

37. On the *nine* (9) members on the Loft Board, only *one* (1) purportedly represents the real estate industry. Hence, persons such as labor leaders and loft tenants have been delegated the majority power to totally control the plaintiff's building. These individuals have been given the power to

dictate allowable rents, the duration of the leases, and the services that must be provided. In enacting the Loft Law, the State took away from the property owners the right to make these fundamental business decisions, and gave the right to persons having no economic interest in the building. Clearly, such a vast delegation of virtually all of the property owner's rights to an anti-owner political group constitutes a seizure in its most classic constitutional sense.

38. In reality, the deck was stacked against the plaintiff the day the Loft Board hearings began. As is virtually the case with every decision it makes, the Loft Board, by a vote of eight to one, ruled against the owner. The Owner never expected the Loft Board to do anything, other than issue such a one-sided,

* * *

49. The first deficiency in the defendants' argument is that just because the plaintiff became aware that the tenants had freely and voluntarily elected to flout the law by illegally living in their units, did not make such acts lawful.

50. The second deficiency in the defendants' analysis is that just because the plaintiff became aware that the tenants had freely and voluntarily elected to flout the law by illegally living in their units, did not make the leases any less enforceable than they were on the day that the tenants agreed to abide by the terms, covenants and conditions contained in those leases, which leases all contain "no waiver" and "no oral modification" clauses.

51. The most frightening deficiency inherent in the defendants' argument is that because the plaintiff became aware of the tenants' contemptuous disregard for law and lease, that in some perverse way, gave the state the right to seize the

plaintiff's property and to transfer it to the tenants. Apparently, the unspoken sentiment is that because the tenants violated the law and breached their leases, it is the plaintiff who should be punished, not because the plaintiff was the wrongdoer, but rather because it became aware of the wrongdoing

52. The attitude manifested by the defendants exemplifies what the plaintiff claims is fundamentally wrong with the Loft Law. Their entire argument is build upon a disregard of the fact, which is basic to the Loft Law, that loft tenants committed deliberate criminal acts by living in their units, and that as a result, it is the owner who is being punished by the confiscation and conscription of his building.

53. This is a classical example of a Bill of Attainder. Through no fault of its own, the plaintiff is being punished by an act of the legislature, without any trial for the deliberate wrongdoing of its tenants. Despite what the Governor-defendant says in his memorandum of law — that statutes have rarely been invalidated on this ground — does not mean that this Constitutional provision has any less force or effect than it did when it was inserted into the Constitution by the founding Fathers.

***

66. In 1980, two years before the enactment of the Loft Law, the City adopted the Relocation Incentive Program which *required* owners of loft buildings in certain areas of the City who *wanted* to convert their buildings to multiple dwellings to pay a substantial "conversion contribution" before they could obtain an alteration permit. In the case of 640 Broadway, this "contribution" would initially have amounted to $440,000.00. (Originally the "conversion contribution" was $4.50 *per square foot*, but it was raised to $9.00, the then to $11.00 per square foot.) Buildings required to pay the

"conversion contribution" were called "applicable buildings." In order to be an applicable building, space in the building must have been used for certain industrial purposes on August 31, 1980, or if vacant on that date, used for industrial purposes within three (3) years of that date. This included virtually every old commercial building in downtown Manhattan, including 640 Broadway.

* * *

68. With the enactment of the Loft Law in 1982, which *mandated* involuntary residential conversions, the very real possibility existed that the owners of loft buildings would have to pay *both* the costs of converting the building to a multiple dwelling, and the "contribution" to the relocation program.[3] To qualify for an exemption, an application had to be filed with the Board of Standards and Appeals by September 1, 1983, so on January 4, 1983, the plaintiff filed an application in order to avoid having to pay this so-called "contribution." It was *not* a change of use or zoning change application, and after the Loft Law was enacted, the plaintiff never filed any further variance of use or zoning change applications.

69. Annexed to that alteration application was a Building Department order which stated that 640 Broadway was an "applicable building," and that the plaintiff would have to make the "conversion contribution." *Thus, the alteration application was filed by the Owner for the sole purpose of avoiding the mandatory conversion contribution to the New York City Business Relocation Assistance Corporation.* A copy of the Building Department order is annexed hereto as Exhibit "B."

70. Notably, in the prior year, the plaintiff filed a required "preliminary application" under protest in which the Owner stated in part:

> "With respect to these premises, Sec. 15 of the Zoning Resolution as it appears to require 'conversion contributions' of $9.00 per square foot

[3] In order to avoid this double confiscation, the Loft Law was amended in 1987 to provide that buildings subject to the Loft Law would be exempt from paying any "conversion contributions." MDL §285(3).

> to be paid to the City is illegal and unconstitutional. By the execution of these documents, the undersigned in no way waives its rights to protest or seek judicial relief, or commence or maintain any other legal proceedings to declare that said extortionate fee being claimed by the City is illegal and unconstitutional and owner reserves all rights with respect thereto."

71. Thereafter, in *August of 1983*, the occupants of 640 Broadway filed their "coverage" application with the Loft Board. Almost five years later, on *April 28, 1988*, that application was granted, when twenty (20) units were found to be "covered" by the Loft Law. Despite of the the fact that the plaintiff only rented seventeen (17) units, twenty (20) were found to be covered by the Loft Law. The additional three (3) units came into existence in violation of the Building Code and the leases when the tenants "subdivided" units without the plaintiff's consent. ***

85. As originally enacted, the Loft Law contained a mechanism for exemption from coverage for those buildings for which compliance would cause an "unjustifiable hardship" (MDL §285(2)). However, the owners of buildings subject to the law were required to submit hardship applications to the Loft Board within nine (9) months of the establishment of the Loft Board. The City-defendants claim that the Loft Board notified the owners of buildings which "appeared to be subject to Article 7-C" of the June 30, 1983 deadline for hardship applications. (City Mem. Law, pp. 31-32).

* * *

88. Even more ludicrous was the legal requirement that the owners submit *sworn affidavits* speculating on the total cost of the building renovations and the other costs of compliance (*e.g.*, the cost of obtaining a zoning variance), as well as projecting the operating income and expenses *after* the conversion was complete. Obviously, compliance was impossible because all of these numbers were unknown. A copy of these so-called "hardship" regulations is annexed hereto as Exhibit "I."

***

101. Paragraphs 39 and 40 of the leases served a different purpose. Those paragraphs provided that if a tenant used a unit for a purpose which violated the law or which violated his or her lease, the tenant would indemnify plaintiff and hold it harmless from any claims, penalties, loss, damage or expense, including attorneys' fees.

102. In making the leases, the plaintiff never agreed to accept the tenants as anything other than commercial tenants. They were never accepted as residential tenants. Plaintiff prohibited them from being residential tenants. The plaintiff never agreed to provide the sort of services which would have to be provided to residential tenants. In determining the rent, which was freely negotiated, the plaintiff did not factor in the cost of providing residential services because the leases were commercial, not residential in nature. Neither did the rents reflect the enormous costs that would be involved in converting the building into a legal multiple dwelling, if that was even legally or structurally possible.

103. The standard leases at 640 Broadway were commercial in nature and were not residential for the following reasons:

a. Paragraph 4 required the *tenant* to make all non-structural repairs at *tenant's* sole cost and expense.

b. Paragraph 29 required the *tenant* to pay the costs of installing a sprinkler system if same became necessary, and to do everything else to comply with all applicable laws, building codes and regulations [also ¶ 6].

c. Paragraph 30 required the landlord to provide heat only on business days from 8:00 a.m. until 6:00 p.m. and on Saturdays from 8:00 a.m. to 1:00 p.m. The landlord *was not required to furnish heat in the evening, on Saturdays after 1:00 p.m. or on Sundays.*

***

g. Pursuant to Paragraph 41 the *tenant* was obligated to "replace all damaged or broken plate glass or other glass in or about the demised premises."

h. Pursuant to Paragraph 42 the *tenant* "at its sole cost and expense shall be solely responsible for and pay for all utilities and/or services used and required by tenant, including electricity and gas and water."

i. Pursuant to Paragraph 54 the landlord was entitled to periodic rent increases based upon increases in the Consumer Price Index.

j. Pursuant to Paragraph 66 the tenant "shall require all its contractors, plumbers and electricians to supply to the landlord a certificate of insurance naming the landlord as an additional insured prior to the commencement of any work by said contractor, plumber or electrician."

k. Paragraph 72 provides that the tenant agrees "to accept the demised premises 'as is' in its condition as of the date" of the lease.

* * *

104. The foregoing are the sorts of provisions found only in commercial leases. For the defendants to now contend that the occupants of 640 Broadway possess the lifetime rights of residential tenants, is to make a mockery of the leases and to totally destroy the plaintiff's property rights. In effect, they argue that it does not matter what the leases said. If the tenants want to violate the leases and numerous civil and criminal laws by living in their units, and if the government wants to step in and give its legal "stamp of approval" to such violations and grant lifetime estates to a retroactively selected group of individuals, arbitrarily defined, the landlord is powerless to object, or so the defendants would have this court believe.

105. An examination of the various court decisions, briefs and jurisdictionally statement in the *Spring Realty* case, shows that these contract provisions were not before the court in that case and accordingly, there is no reason to prevent this Court from deciding the very specific contract impairment claims which the plaintiff raises. Furthermore, no determination had been made in *Spring Realty Co.* that the buildings were covered by the Loft Law and therefore that case is irrelevant.

* * *

130. In addition, the City-defendants repeatedly state that the owners of interim multiple dwellings are "merely" expected to comply with "minimal housing standards." It seems naive in the extreme to consider "minimal," the mandatory and undisputed investment of Two Million Dollars which would be necessary to convert this 100-year-old commercial structure into a multiple dwelling.

these purported violations have since been corrected, the threat of future enforcement proceedings and harsh penalties is continuous and very real.

132. Clearly, the economic injury that is central to any ripeness inquiry is present in this case. The seizure of the building by the tenants is compounded by their persistent failure over the last several years to pay any rent or use and occupancy in reliance upon the Loft Law. At the present time, the Owner is owed rent, rent increases and use and occupancy in excess of $600,000.00.

133. There is nothing "abstract" about the uninvited physical occupation of the plaintiff's property by the present occupants. There is nothing "hypothetical" about the residential use of the premises in contravention of the commercial leases, the building's certificate of occupancy, the building code and local zoning laws. There is nothing more "concrete" than the illegal sublets, assignments and subdivisions that have taken place in some of the units without the Owner's consent, or the non-payment of rent over the past several years.

134. In conclusion, the plaintiff has already suffered severe economic injury; the threat of even greater future harm is imminent, the Loft Board's determination of coverage is final; the cost of compliance is exhorbitant; and the impossible to comply with "application" for a "hardship" exemption, previously illusory if not futile, is absolutely precluded by the expiration of such exemptions. It is therefore difficult to imagine a legal controversy which is more "ripe" for immediate judicial review. Furthermore, this case raises substantial federal questions which should be decided on the merits.

WHEREFORE, the plaintiff respectfully prays that its motion for summary judgment be granted, that the defendants'

APPENDIX FF

SUPREME COURT OF THE STATE OF NEW YORK;APPELLATE DIVISION; FIRST DEPARTMENT

---

640 BROADWAY RENAISSANCE CO.

Plaintiff-Appellant

-against-

JOHN EISNER, et al,

Defendants-Respondents.

AFFIRMATION IN SUPPORT OF MOTION FOR REARGUMENT OR, ALTERNATIVELY, LEAVE TO APPEAL TO THE COURT OF APPEALS

BRUCE H. WIENER. . .

3. Reargument or, alternatively, leave to appeal to the Court of Appeals should be granted for several reasons. First, the Court inexplicably ignored the issues raised by the summary judgment motions, and relied solely upon the Tenants' attorneys's unsupported allegation (made in reply) that Renaissance "deliberately withdrew" its special permit application. Such an allegation, in fact, was not included in the Tenants' single affidavit (of the reputed leader of the Tenant's Association) submitted in support of their own motions. Thus, based upon the Tenants' attorney's submission, Renaissance was not obligated to come forward with proof regarding its special permit application, but rather submitted an affidavit denying all of the Tenants' baseless claims. Renaissance vehemently disputed Tenants' unsubstantiated claims regarding its "intent", thereby at least creating an issue of fact which warranted the denial of summary judgment. In fact, the accompanying affidavit of Joseph Pell Lombardi, Renaissance's architect, finally puts an end to the issue of Renaissance's withdrawal of the

special permit application and explains that it was done because of changes in the law. The Court inexplicably ignored the many issues of fact, and proceeded to determine the appeal as if this case were not a summary judgment case.

4. . . . The Court, however, failed to acknowledge that Renaissance registered the Building with the Loft Board in September, 1991 and renewed its registrations as required. Renaissance also timely filed an alteration application with the Department of Buildings in September, 1992 – prior to the October, 1992 deadline. Thus, the Court compounded the erroneous findings of the IAS Court that Renaissance had done nothing toward legalization, and all of Respondents' claims in that regard were sharply disputed by Renaissance and raised issues of fact which should not have been summarily disposed of by this Court.

. . .

7. . . .The leases have since expired but they all provided for the payment of rent on a monthly basis along with a yearly cost of living adjustment.

8. Most of the Tenants stopped paying rent to Renaissance in or about September 1988, . . . apparently in an effort to compel a sale of the Building or to force Renaissance into bankruptcy . . . As a result of the Tenants' rent strike, Renaissance was forced to file a petition in bankruptcy, seeking relief under the applicable provisions of the bankruptcy laws. . . .

. . . f.n. Contrary to the IAS Court's erroneous finding, Renaissance registered the Building with the Loft Board in September, 1991 . . . and renewed its registration in July, 1992 and thereafter. Renaissance also filed a timely alteration application with the Department of Buildings on September 26, 1992 . . .

. . .

17. Renaissance did, in fact, apply to the CPC for a special permit on June 3, 1983 . . ., but was later compelled to withdraw the application in October 1985, which had not been acted upon, because of changes in the law. See, accompanying affidavit of Joseph Pell Lombardi, which clearly puts this fabricated "issue" to rest. Prior to the application's withdrawal, the CPC had informed Renaissance that it would no longer continue to process such permit applications and directed Renaissance to withdraw the application. Thus, Renaissance did not withdraw its application in October 1985 because of the passage of the Loft Law in June 1982, within weeks of the application's filing. If Renaissance's motive, as the Tenants speculate, was to frustrate the Loft Law, then Renaissance could have immediately withdrawn its application the same month, upon the enactment of the Loft Law. The record irrefutably shows that it did not, and belies Tenants' purely speculative allegations.

. . .

18. . . . In any event, the 1992 amendments to the Loft Law, which do not require a special permit, superseded the 1988 Loft Board order, stating that coverage is contingent upon Renaissance's obtaining a special permit.

19. In addition, any requirement of a special permit was evidently eliminated by the 1987 amendments to the Loft Law, and subsequently confirmed in City of New York v. State of New York, Index No. 44141/88, decided October 27, 1989 (Gnarled, J.), aff'd, 171 A.D.2d 629, 568 N.Y.S.2d 323 (1st Dept. 1991). In that case the City wished, among other things, to enforce the Zoning Resolution requirement of a special permit, and claimed, in part, that the 1987 Loft Law amendments were unconstitutional and void because they effectively repealed the City Zoning Resolution requiring special permits for residential use in oversized buildings. This Court affirmed and upheld the 1987 Loft Law that apparently did away with the need for any special permit.

20. Thus, after the City of New York lawsuit, it became apparent that, by superseding state statute, the Loft Board did not have the power even to make coverage contingent upon Renaissance's obtaining a special permit, because such permits were no longer required by law. In addition, there is likewise no requirement for such special permit in the 1992 amendments to the Loft Law. Thus, because of the amendments, which clearly override the Loft Board order and do make clear that no special permit is required, Renaissance has not, and is not in violation of any law of Loft Law Order. . . .

. . .

23. Although the Court did not specifically state that the 1992 amendments are not retroactive, the Court did hold that Renaissance is not entitled to its benefits retroactively purportedly because Renaissance did not apply for a special permit. As demonstrated herein, a special permit is not required, and such requirement was eliminated even before the Tenants went on their "rent strike." At present, the only requirement is for the filing of an alteration application, which Renaissance filed so as to be fully entitled to the law's benefits.

. . .

28. The Court's Order and interpretation adversely affects the constitutional rights of landlords and their ability to collect past due rents, and be able to pay for legalization expenses and the maintenance of upkeep of their buildings. At the same time the Court's Order results in an undeserved windfall to the Tenants.

. . .

Dated: New York, New York
March 10, 1995

/s/
BRUCE H. WIENER

APPENDIX GG

SUPREME COURT OF THE STATE OF
NEW YORK; APPELLATE DIVISION;
FIRST DEPARTMENT

---

640 BROADWAY RENAISSANCE CO.

Plaintiff-Appellant, INDEX x23830/82

-against-

JOHN EISNER, ET AL,

Defendants-Respondents.

AFFIDAVIT OF JOSEPH PELL LOMBARDI IN SUPPORT OF MOTION FOR REARGUMENT OR, ALTERNATIVELY, LEAVE TO APPEAL TO . . COURT OF APPEALS

STATE OF NEW YORK
COUNTY OF NEW YORK

JOSEPH PELL LOMBARDI, being duly sworn, deposes says:

. . .

2. I am . . . a registered architect and have performed architectural work for Renaissance since at least 1979 in connection with the building located at 640 Broadway, New York. . . When I first inspected the Building, it was a factory building which was virtually empty. Renaissance purchased the Building after a mortgage foreclosure at which time it was nearly abandoned and in terrible condition. Over the years since my first visit, the Building has been totally renovated by Renaissance and major capital improvements have been made.

3. In or about June, 1982, Renaissance filed a special permit application with the City Planning Commission ("CPC") pursuant to section 74-782 of the Zoning Resolutions (R.724). Renaissance withdrew that application in October 1985 (R.749).

. . .5. Although Renaissance, through me, withdrew its special permit application, it did not do so to thwart the legalization process in any way or for any nefarious purpose. Rather, Renaissance was compelled to withdraw the application because of changes in the law. Notably, Renaissance did not withdraw the application (in 1985) because of the passage of the Loft Law, as has been alleged by the Tenants, since the application was received by the CPC on June 3, 1982, and the Loft Law became effective only a few weeks later, on June 21, 1982.

6. Simply put, the CPC informed Renaissance that it would no longer continue to process such special permit applications, as jurisdiction had been transferred to the Board of Standards and Appeals. In fact, CPC informed Renaissance, by letter, that if the special permit application were withdrawn, it would be converted to an occupant-initiated Residential Loft Occupancy Determination Application. . . .

7. Hence, Renaissance was compelled to withdraw its application, and did not do so for the purpose of frustrating the legalization process. The withdrawal of the permit application was solely the result of changes in the law. Notably, the application was withdrawn over three (3) years after its submission, and the failure of the CPC to complete its processing.

8. In fact, Renaissance, which has long sine filed its alteration application and obtained a building permit, never needed to renew its special permit application because such a requirement was eliminated.

/S/ JOSEPH PELL LOMBARDI

Sworn to before me this
___day of March 1995.

APPENDIX HH

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
FIRST DEPARTMENT

640 BROADWAY RENAIISANCE CO.,
Plaintiff-Appellant,

-against-

JOHN EISNER, et. Al.,

Defendants-Respondent,

-and-

15 Other Cases Consolidated for
Purposes of a Joint Appeal.

REPLY AFFIRMATION IN FURTHER SUPPORT OF MOTION FOR REARGUMENT OR, ALTERNATIVELY, LEAVE TO APPEAL TO THE COURT OF APPEALS.

New York County Clerk's Index No. 23830/92

BRUCE H. WIENER, an attorney duly admitted to practice in the courts of this State, under penalty or perjury, affirms as follows:

3. It is apparent that the Court did not consider many of Renaissance's arguments raised in its briefs on appeal inasmuch as the Order appeared to focus solely on the "red Herring" raised by Respondents' counsel – that Renaissance "deliberately withdrew" its special permit application. This Court, however, did not address the most important issue of fact as to the reason behind the withdrawal which, in and of itself, precludes summary judgment. Renaissance, in fact, was instructed by the city agency to withdraw its application and, as set forth herein, at the same time went forward with its application for a determination of loft occupancy, a necessary prerequisite to the issuance of any special permit.

4. Contrary to the record, the facts and the applicable law, the Court summarily affirmed the IAS Cvourt's erroneous "finding," based upon pure speculation of counsel, that Renaissance is not in compliance with the Loft Law because it "deliberately withdrew" its special permit application. Neither the Court nor the Respondents addressed the fact that the 1992 amendments to the Loft Law do not require the filing of a special permit application to be in compliance with the statute, and that the 1987 Loft Law amendments actually eliminated any such requirement.

5. Renaissance submits the affidavit of its architect Joseph P. Lombardi so that the issue of the "withdrawal" of the special permit can be put into proper perspective and demonstrated to be the total "red herring" that it is (and that it clearly cannot be the basis for summarily dismissing Renaissance's substantial rent claims). Mr. Lombardi's affidavit is based upon his person knowledge...

8. Respondents disregard the fact that the 1992 amendments to the Loft Law do not require the filing of a special permit application to be in compliance with the statute. Notably, neither the 1988 Loft Board Order which made coverage under the Loft Law "contingent" upon Renaissance's obtaining a special permit, nor the Loft Law itself, imposed any deadline for filing such application or obtaining siuch permit. In any event, the enactment of the 1987 and 1992 amendments did away with the requirement for a special permit such that "reapplication" for a special permit was rendered unnecessary.

9. Furthermore, the 1987 and 1992 amendments supercede the 1988 Loft Board Order so heavily relied upon by the Court. The fact that Renaissance withdrew the special permit application under instructions from the City Planning Commission ("CPC"), does not lead to the "inevitable conclusion" that Renaissance did not take all necessary and reasonable steps to legalize the Building. The affidavit of Mr. Lombardi is meant to challenge that rank assumption made by the IAS Court and affirmed by this Court.

10. Respondents do not even address the effect of the case of City of New York v. State of New York, Index No. 44141/88, decided October 27, 1989 (Nardelli, J.), aff'd, 171 A.D.2d 629, 568 N.Y.S.2d 323 (1st Dept. 1991). This case confirms that any requirement of a special permit was eliminated by the 1987 amendments to the Loft Law. Apparently unable to dispute the effects of this case, Respondents chose simply to ignore it and hope the Court would do the same. In any event, a special permit is no longer necessary.

11. ... the Court held that Renaissance could not "claim the benefits of the 1992 amendments to the statute" because it "withdrew its application for a necessary special permit . . . and then never sought to renew the application, despite a Loft Board order." Thus, despite the fact that the 1988 Loft Board Order did not direct the filing of a special permit application and, by that time, the Loft Law had been amended to delete such requirement, this Court based its decision on an erroneous finding that such special permit was necessary, and was required by Loft Board Order.

12. ...Despite these numerous attempts to clarify this issue, the Court relied solely upon the unsupported allegations of Respondents' counsel. Noticeably absent from any of Respondents' submissions was any affidavit from the Respondents themselves, or anyone with personal knowledge, in this regard.

14. Moreover, Respondents' claims that the withdrawal was "a deliberate effort to sabotage the legalization of the building," (Ratner Aff., Par.9,), made solely in an affirmation of Respondents' counsel (as are all of Respondents' claims in this regard", is a further fabrication by the Respondents. . .Second, Respondents ignore the fact that the CPC never processed the special permit application by the time it was withdrawn. Finally, although the special permit application may have been withdrawn, it cannot be disputed that Renaissance filed an application in 1983 for a Determination of Residential Loft Occupancy pursuant to the Zoning

Resolution, under CPC File #N83153OZJM, which was finally approved in October 1988 (See Exhibit "A". Thus, despite Respondents' disingenuous statements that Renaissance "sabotaged" the legalization process, the facts are to the contrary. By filing the application for a Determination of Residential Loft Occupancy with CPC, Renaissance was necessarily advancing, and by no means "sabotaging", the legalization process. A determination of loft occupancy was required before any special permit could have been processed and issued. By the time the determination of loft occupancy was finally made – October 1988 – the 1987 amendments to the Loft Law had already been enacted and were being challenged in the City of New York lawsuit. Thus, it can hardly be said that Renaissance was "sabotaging" the legalization process.

15. . . .The 1987 and 1992 amendments to the Loft Law do not require a special permit and certainly supersede the 1988 Loft Board Order. The 1988 Loft Board Order was issued during the three year period that the challenge to the 1987 Loft Law amendments was tied up in the court system. This unfortunate timing does not negate the law, however. Once the issue was resolved in the courts, by the City of New York case, it was established that a special permit was no longer required. It is axiomatic that the Loft Law superseded the 1988 Loft Board Order.

16. Both the Court and Respondents also ignore that Respondents unequivocally admitted in a prior litigation that the legalization timetables in the original Loft Law do not apply. They are, therefore, judicially estopped from now claiming otherwise.

Dated: New York, New York

March 24, 1995

Bruce H. Wiener

APPENDIX II - LOFT BOARD REGULATIONS MAY, 1983

LOFT BOARD

PURSUANT TO
SECTION 1105 OF THE
NEW YORK CITY CHARTER, Article 7-C of the Multiple Dwelling Law, and Mayor's Executive Order No. 66, The New York City Loft Board hereby promulgates the following Rules and Regulations Relating to Loft Board Procedures for Conducting Business and Considering Applications.

Regulations for Internal Board Procedures

I. Composition of the Board/Voting

1. The Loft Board (hereinafter referred to as "the Board") shall consist of 9 members, including an impartial Chair and one representative of loft manufacturing interests, one representative of the real estate industry and one representative of loft residential tenants, respectively. The other members, representing the public, shall include the Commissioner of the Department of Buildings, serving ex officio and may include one other member serving ex officio. The Board may conduct business with fewer than 9 members when one or more vacancies are created by the death, resignation, or inability of a member or members to continue serving on the Board for any reason, until the appointment of replacement(s) by the Mayor.

2. Each member of the Board shall have one vote. No members, except those serving ex officio, may vote by proxy or have another person serve on the Board in their absence Representatives of the special interest groups, specified in paragraph 1, supra, may in their absence, designate substitutes to participate in discussions at the Board meetings, when the Board, by vote requests such participation. Such designated substitutes may participate only to the extent permitted by the Board and shall not have the right to vote.

* * *

II Rules and Regulations

4. The Board shall issue rules and regulations governing its procedures and the exercise of its powers under Article 7-C of the New York State Multiple Dwelling Law and Executive Order No. 66 of Mayor Edward I. Koch. Loft Board staff shall be responsible for drafting rules, regulations, guidelines and procedures at the direction of the Chair or by vote of the Board. In addition, draft rules, regulations, guidelines and procedures may be presented to the Board for consideration by Board members or other interested parties. Loft Board staff shall comply with Section 1105 of the New York City Charter in the promulgation of all rules and regulations. All draft rules and regulations proposed shall be submitted to the Board for comment and review before they are published for comment. Draft rules and regulations may be modified at the direction of the Chair or by vote of the Board. In case of disagreement between the Chair and at least four (4) members of the Board, alternative versions may be published. Upon vote of the Board, rules and regulations shall be adopted and ordered into effect following periods for public notification and comment, mandated by Section 1105 of the New York City Charter, and hearings when required by Section 282(d) of Article 7-C of the New York State Multiple Dwelling Law, except that emergency regulations or guidelines may be adopted without prior public notification and comment.

IX. Action by the Board on Its Own Initiative

30. The Board on its own initiative may commence appropriate proceedings or investigations pursuant to its powers or duties under Article 7 C of the Multiple Dwelling Law, including, but not limited to, findings, determinations or enforcement proceedings concerning coverage, hardship claims, rent adjustments, fixture fee disputes, exemptions and compliance with requirements of Article 7 C, including the the minimum housing maintenance standards promulgated by the Board. Prior to making a finding or determination pursuant to Article 7 C, the Board shall afford the party against whom a proceeding is directed an

opportunity to be heard on not less than 10 days notice by regular mail.

I do hereby certify that good cause exists for waiving the requirement that thirty days shall first elapse after publication in THE CITY RECORD and that the foregoing Regulations shall be come effective on the date of publication.

Dated: May 6, 1983

Filed with the City Clerk: May 9, 1983